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## Eugene Rodriguez
## Docket Entries.

(UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK, 69 CIVIL 348)

*Docket Entries.*

PROCEEDINGS

*Date*
1969

Sept. 29—Filed Complaint and/or Petition for Writ of Habeas Corpus and Motion.

Oct. 6—Motion for Bail. One week for answering Affidavit. Decision reserved.

Oct. 9—Filed Affidavit in opposition to motion for bail.

Oct. 13—Filed Affidavit of personal service of Affidavit on Eugene Rodriguez on October 10, 1969.

Oct. 16—Filed Summons served October 2, 1969 on Joseph David, Deputy Comm. of Correction for Paul D. McGinnis, Comm. of Corr.; served October 2, 1969 on Victor Zuckerman, Atty. Board of Parole, for Russell G. Oswald, Chairman of the Board of Parole; served Sept. 30, 1969 on Frank Ryan, Head Clerk, for J. Edwin LaVallee, Warden; served October 14, 1969 on Francis A. Ryan, Head Clerk for J. Edwin LaVallee, Chairman of the Board Prison; served October 2, 1969 on Victor Zuckerman, Atty. New York State Board of Parole; served October 2, 1969 on Joseph David, Deputy Commissioner of Correction, New York State Dept. of Correction.

Oct. 16—Filed Answer of Defendants.

Oct. 16—Filed Affidavit of Service personally of Answer of Defendants.

Oct. 27—Writ of Habeas Corpus Ad Testificandum. returnable October 31, 1969 at 10 A.M. at Albany, New York.

*Eugene Rodrigues Docket Entries.*

*Date*

Oct. 27—Writ Issued and delivered to U. S. Marshal for service.

Oct. 27—Filed Memorandum-Decision and Order—Foley, D. J. for an evidentiary hearing to be held October 21, 1969 at Albany, N. Y. at 10 A.M. Attorney Richard A. Kohn is duly assigned as Attorney for plaintiff. The motion for bail is denied. It is So Ordered—James T. Foley, U.S.D.J.

Oct. 30—Filed Writ of Habeas Corpus ad Testificandum served October 28, 1969 on J. Edwin LaVallee, Warden and Chairman of the Prison Board of Clinton State Prison.

Oct. 31—Return of Writ of Habeas Corpus. (Pre-Trial Conference 3 hrs.) Trial. Petitioner satisfied with attorney assigned him and sufficient time to discuss same. Writ continued until Monday morning at 11:00 A.M. in Albany. Nov. 3 Trial continued. Defendant moves for dismissal of petition on grounds stated. Motion denied on jurisdictional grounds and reserve decision on motion to dismiss on failure of proof. Briefs to be filed with Judge Foley by Next Monday, November 10, 1969.

Nov. 12—Filed Memorandum of Law on behalf of Defendants-Respondents.

Nov. 14—Filed Memorandum on Behalf of Plaintiff-Petitioner.

Nov. 25—Filed Minutes of Hearing held October 31, 1969 before Hon. James T. Foley.

*Eugene Rodrigues Docket Entries.*

*Date*

Dec. 28—Filed Defendant's Exhibit D—Inmates Rule Book, State of New York Revised 9/1/68.

Dec. 28—Filed Defendant's Exhibit E—State of N. Y. Dept. of Correction Employees Rule Book.

Dec. 28—Filed Photostatic copies of Plaintiff's Exhibits.

Dec. 28—Filed Memorandum-Decision and Order—Foley, D. J. that the disallowance of 120 days and cancellation of 120 days good behavior credit time is void and unlawful as violative of the provisions of the Fourteenth Amendment of the United States Constitution. The Commissioner of Correction of the State of New York is hereby directed to restore the remaining period of good time credit to the plaintiff. Such allowance will entitle the plaintiff to release forthwith, etc. If such release is not accomplished within a reasonable time, the attorney for the plaintiff shall submit a writ of habeas corpus to effect such release. Judgment shall enter in favor of the plaintiff granting the relief specifically outlined herein and this decision is the judgment. It Is So Ordered—James T. Foley, U.S.D.J.

Dec. 24—Mailed notice re Judgment to: Richard A. Kohn, Esq., 100 State St., Albany, N. Y. 12201 and Hon. Louis J. Lefkowitz, Atty. General, The Capitol, Albany, N. Y. 12224 Att: Mr. Timothy F. O'Brien, Asst. Atty. General.

*Eugene Rodrigues Docket Entries.*

1970

Jan. 6—Filed Notice of Appeal.

Jan. 7—Forwarded Certified Record on Appeal consisting of original papers to Clerk, USCA.

Jan. 14—Filed Receipt—Clerk, U.S.C.A. 2nd Circuit for cert. copy of docket entries and original papers of Record on Appeal.

Jan. 30—Filed Exhibit A—Disciplinary Report from Sing Sing Prison—10/30/68.

Jan. 30—Filed Defendant's Exhibit B—Disciplinary Report from Sing Sing Prison—10/31/68.

Jan. 30—Filed Defendant's Exhibit C—Letters of 11/1/68 from Deegan to Comm. McGinnis.

Jan. 30—Filed Defendant's Exhibit F—Official compilation of Rules of Dept. of Correction.

(UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, DOCKET No. 34567)

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 1- 8-70 | Received record (original papers of District Court) |
| 2- 2-70 | Received supplemental record (original papers of District Court) |
| 2-16-70 | Filed record and supplemental record (original papers of District Court) |
| 3-17-70 | Filed order removing original record (appellants) |

*Eugene Rodriguez Docket Entries.*

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 3-30-70 | Filed 4 copies brief, appellants with proof of service |
| 3-30-70 | Filed order extending time to file notice re deferred appendix to 3-30-70 |
| 3-30-70 | Filed notice re deferred appendix |
| 4- 1-70 | Filed motion for appointment on appeal |
| 4- 9-70 | Filed affidavit of service by mail |
| 4-10-70 | Filed order granting motion of Richard A. Kohn to be appointed as counsel for appellee |
| 5- 7-70 | Filed brief, appellants with proof of service |
| 6-10-70 | Filed motion for calendar preference and early argument date, etc. with proof of service |
| 6-15-70 | Filed order granting motion for preference and for leave to file appendix; appellee shall file its brief by 6-26-70 together with a motion to dismiss appeal; appellant's reply brief by 7-10-70; argument shall be heard 7-16-70 |
| 6-15-70 | Filed appendix, appellants |
| 6-29-70 | Filed brief, appellee, with proof of service (mailed 6-26-70) |
| 6-29-70 | Filed motion to dismiss with proof of service (mailed 6-26-70) |
| 7- 1-70 | Filed motion to file instanter brief of amici curiae (N.A.A.C.P.) |
| 7- 9-70 | Filed order granting motion to file brief amici curiae (NAACP) |

*Eugene Rodrigues Docket Entries.*

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 7- 9-70 | Filed brief for Amici Curiae, N.A.A.C.P. with proof of service |
| 7-10-70 | Filed affidavit in opposition to motion to dismiss with proof of service |
| 7-10-70 | Filed reply brief, appellant with proof of service |
| 7-16-70 | Argument heard (By: Waterman, Moore & Hays, CJJ) |
| 3- 3-71 | Filed order denying motion to dismiss |
| 3-16-71 | Judgment Reversed, Hays, CJ |
| 3-16-71 | Dissenting in separate opinion, Waterman, CJ |
| 3-16-71 | Filed judgment |
| 3-30-71 | Filed petition for rehearing and rehearing in banc with proof of service. |
| 7-19-71 | Filed order denying petition for rehearing |
| 7-19-71 | Filed order granting reconsideration in banc, etc.; the in banc proceedings in the three cases are consolidated; if petitioners desire to file further briefs, they may do so by 8-16-71; if respondents desire to file further briefs, they may do so by 9-13-71 further oral argument will not be heard unless otherwise ordered (consolidated with 35300 and 35253) |
| 10-12-71 | Filed order re in banc judges of the court and members of the respective panels who have taken senior status, will hear oral argument 11-4-71 at 2 P.M. Room 506; if counsel desire to file additional briefs on these subjects these should be served and filed by 11-1-71 (& in 35253, 35300) |

*Eugene Rodriguez Docket Entries.*

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 11- 1-71 | Filed brief, appellants (on rehearing) with proof of service (& in 35253 and 35300) |
| 11- 4-71 | Argument heard (by: Friendly, ChJ, Waterman, Moore, Smith, Kaufman, Hays, Feinberg, Mansfield, Mulligan, Oakes & Timbers, CJJ) (& in 35253 and 35300) |
| 1-25-72 | Judgments Affirmed, Friendly, Ch. J., (& in 35253, 35300) |
| 1-25-72 | Friendly, ChJ with whom Mulligan, CJ joins concurring in separate opinion (& in 35253, 35300) |
| 1-25-72 | Waterman, CJ concurring in separate opinion (& in 35253, 35300) |
| 1-25-72 | Smith, CJ concurring in separate opinion (& in 35253, 35300) |
| 1-25-72 | Kaufman, CJ concurring in separate opinion (& in 35253, 35300) |
| 1-25-72 | Feinberg, CJ concurring in separate opinion (& in 35253, 35300) |
| 1-25-72 | Mansfield, CJ concurring in separate opinion (& in 35253, 35300) |
| 1-25-72 | Oakes, CJ concurring in separate opinion (& in 35253, 35300) |
| 1-25-72 | Timbers, CJ concurs in opinions of Smith, Kaufman & Feinberg (& in 35253, 35300) |

*Eugene Rodrigues Docket Entries.*

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 1-25-72 | Lumbard, CJ dissenting with whom Moore and Hays concur in separate opinion (& in 35253, 35300) |
| 1-25-72 | Filed judgment (& in 35253, 35300) |
| 2-10-72 | Issued Mandate (judgment) opinion on rehearing and order |
| 2-10-72 | Filed itemized and verified bill of costs |
| 2-18-72 | Filed statement of costs |
| 2-18-72 | Issued statement of costs |
| 4-28-72 | Filed notice of filing of petition for writ of certiorari (& in 35253, 35300) |
| 6-20-72 | Original record returned to district court (& in 35353, 35300) |
| 6-23-72 | Filed certified copy of order of Supreme Court granting petition for writ of certiorari (& in 35353, 35300) |

## Complaint and Petition.

Eugene Rodriguez, plaintiff-petitioner (hereinafter called the plaintiff), appearing pro-se respectfully alleges;

1. This action arises under the constitution of the United States, in particular Art. 1, Section 9 Cl. 2 and the Fifth, Sixth, Eighth, and Fourteenth Amendments thereto and under 28 U.S.C. #2241, 2254 and 42 U.S.C. #1983.

The jurisdiction of this court is invoked under 28 U.S.C. #1331, 1343 (3), 2241, 2254 and 42 U.S.C. #1983 and under Art. 1, Sec. 9, Cl. 2 of the Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments thereto.

2. The matter in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand ($10,000) Dollars.

3. Relief is sought herein for petitioners release, pursuant to a writ of habeas corpus, from unlawful custody in violation of plaintiff's constitutional rights; for a declaratory judgment pursuant to 28 U.S.C. #2201 and 2202 and for a preliminary and permanent injunction pursuant to 28 U.S.C. #1651 and 42 U.S.C. 1983. Also plaintiff requests that nominal bail be set pending the final determination of the within habeas corpus for the reason that the issue may become moot if not conclusively determined through all the courts and the plaintiff will suffer irrepairable damage.

Precedent is had on such application for reasonable bail pending final disposition of these specific issues in Daniels vs. La Vallee, 69 Civil 118, U. S. D. C. Northern District of New York.

4. Plaintiff, a natural born citizen of the United States, was convicted after trial of Attempted Grand Larceny on February 14*th*, 1967 and sentenced to an indeterminate term of 1½ to 4 years on February 14*th* 1967 in the Bronx Supreme Court of Bronx County. He has served approxi-

mately 2 years 8 months in prison, without probation or parole, and is presently incarcerated at Clinton State Prison, Dannemora, New York.

5. The individual defendants in this proceeding are sued in their official capacity:

A. Paul D. McGinnis New York State Commissioner of Correction, whose principal office is located in Albany, New York, is charged with the duty of directing and supervising the activities of the defendant, Department of Correction, which administers the prisons and other correctional institutions and programs of New York State, pursuant to the New York Correction Law (herein after Corr. L. #5, 6A, 112, et seq. The Commissioner of Corrections is empowered to appoint the wardens of the various state prisons, including Clinton State Prison who serve under his direction, Corr. L. #234, 803 authorize the Commissioner of Corrections to formulate rules governing the allowance or disallowance of reductions in prison terms "for good conduct and for efficient and willing performance of duties assigned to . . . [prisoners] in prison or penitentiary [hereinafter referred to as "good behavior time credit"].

B. J. Edwin La Vallee, Warden of Clinton State Prison, is the person having direct and immediate custody of the plaintiff. Pursuant to Corr. L. 235, 803, the defendant La Vallee is charged with the duty of acting as Chairman of the "Prison Board" for Clinton State Prison, which determines allowance or disallowance of good behavior time credit.

C. Russell G. Oswald, whose principal office is located in Albany, New York is Chairman of the defendant New York State Board of Parole, which is empowered to determine the qualifications of prisoners for release on Pa-

role; pursuant to Corr. L. #210, et seq., and to supervise prisoners who have been released on parole or under the "Statutory" or conditional release" programs established by Corr. L. #220, 234, 803; Penal Law #70.30, 70.40 and described in greater detail in pargaraphs 6 & 7, *infra.*

6. Prior to September 1*st*, 1967, prisoners serving indeterminate sentences in New York State Prisons were eligible to participate in the "statutory release" program pursuant to Corr. Law #230, which provided that a prisoner serving an indeterminate sentence may earn up to five (5) days per month but no more than two months per year "good behavior time" credit towards the reduction of his maximum time, thereby qualifying the prisoner for mandatory release from prison under supervision of the Board of Parole after serving five-sixths of the maximum term.

7. In 1967, the New York Legislature enacted Corr. L. #803 and Penal L. #70.40 (B) establishing the "conditional release" program, under which a prisoner serving an indeterminate term could earn up to 10 days per-month good behavior time credit towards the reduction of his maximum term, thereby qualifying him for mandatory release from prison under the supervision of the Board of Parole after serving two-thirds of his maximum sentence, provided such prisoner elected to participate in the conditional release program and waived his rights under the "statutory release" program above described.

8. Plaintiff did in fact so elect to participate in the conditional release program and waived his rights under the statutory release program, above described.

9. By virtue of the foregoing, plaintiff is therefore fully qualified for and entitled to "conditional release" *on October 10th, 1969.*

10A. The defendants La Valle and Mc Ginnis, in violation of plaintiff's constitutional rights to due process of law and against the cruel and unusual punishment sections have denied, cancelled and disallowed good behavior time credit towards conditional release, amounting to *4 months and 14 days* to which plaintiff is entitled and have arbitrarily and capriciously extended plaintiff's prison term to *February 24, 1970.*

B. The previously mentioned 4 months and 14 days good behavior time to which plaintiff is entitled under the previously mentioned New York Statutes were cancelled and revoked completely without Due Process of Law. This specific issue is presently before the Courts for determination. See Greenfield vs. Seafati (D. C. Moss), 277 F. Supp. 644; Aff'd per curiam, 390 U. S. 713; U. S. ex rel. Cambell vs. Pate, 7th Cir., 401 F. 2nd 55.

11. The defendants La Valle and Mc Ginnis threaten to unlawfully and unjustly imprison and detain the plaintiff in their custody and pursuant to their order in violation of plaintiffs constitutional rights under the Fifth, Sixth, and Fourteenth, Amendments in that such denial, cancellation and disallowance of good behavior time credit was illegally effected by the defendants La Valle and Mc Ginnis.

A. Without affording plaintiff notice of any charges or a fair hearing at which plaintiff would have the assistance of counsel and the opportunity to confront witnesses, present evidence on his own behalf; and a specification of the grounds and underlying facts upon which the defendant's determination was based.

B. Without substantial evidence or even a basis in fact to support the determination.

C. On information and belief, said determination to deny, cancel and disallow good time behavior credit was

arbitrary and capricious and an abuse of discretion, and was part of a specific program of harassment, persecution, oppression directed at the plaintiff because of the plaintiffs former position. Plaintiff was formerly an attorney, State Assemblyman, and elected State Senator.

D. The harassment and persecution is clear when plaintiff has been told at least 10 times by 4 prison officials that the 4 months and 14 days less 10 days "box time" *will be immediately restored to him* if plaintiff will testify as to information concerning Sing Sing Prison. Said information being unknown to the plaintiff. Also plaintiff has been told that he will be forced to lose every day of future good time for the same reason. Plaintiff has stated that he had nothing to say and that he doesn't know about what they the defendants are asking and the threat to take all his future good time and make him do day for day on the maximum is abritrary and capricious, and an abuse of discretion. It is also a program of harassment persecution and oppression directed specifically at the plaintiff.

12. All available and adequate State remedies have been exhausted.

13. No prior application has been made for the relief requested herein.

Wherefore, plaintiff prays for the following relief:

1. That a judgment issue declaring that determination of the defendants La Valle and Mc Ginnis and their agents denying, cancelling and disallowing 4 months and 14 days good behavior time credit towards plaintiffs conditional release was void, illegal and in violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution for the reasons specified and set forth in paragraph 11.

2. Restraining the defendants La Valle and Mc Ginnis and their agents from denying, cancelling or disallowing good behavior time credit towards conditional release without adhering to procedural due process.

3. Issuing a writ of habeas corpus requiring the defendant Mc Ginnis to order plaintiffs conditional release from imprisonment on October 10th 1969.

4. To set bail as of October 10th 1969 on the plaintiff in a nominal amount pending the final determination of all the issues to avoid the issue becoming moot to plaintiff and order to avoid irreparable injury.

5. Granting such other and further relief as to this court may seem just and proper.

Dated September 25th 1969

Respectfully submitted,

/s/ Eugene Rodriguez
Eugene Rodriguez
43670
Box B
Dannemora, New York 12929

(Verified, September 25, 1969)

## Answer.

Defendants, by their attorney, Louis J. Lefkowitz, Attorney General of the State of New York, for an answer to the complaint of the plaintiff herein, allege as follows:

### First Defense

The complaint fails to state a claim sufficient to establish the jurisdiction of this Court over the subject matter.

### Second Defense

The complaint fails to state a claim against the defendants upon which relief can be granted.

### Third Defense

That any denial, cancellation or disallowance of good behavior time credit to the plaintiff by the defendants in connection with plaintiff's sentence in the Bronx Supreme Court of Bronx County on February 14, 1967 was not in violation of plaintiff's constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution nor was the same in violation of the plaintiff's rights under the New York State Constitution nor in violation of any Federal or State statutes governing plaintiff's incarceration in any prison of the State of New York pursuant to said sentence.

Wherefore, defendants respectfully pray that the complaint herein be dismissed.

Louis J. Lefkowitz,
Attorney General of the
State of New York.

(Verified by J. E. LaVallee, October 14, 1969.)

## Memorandum-Decision and Order of October 24, 1969.

APPEARANCES:

EUGENE RODRIGUEZ, Petitioner Pro Se.

HON. LOUIS J. LEFKOWITZ, Attorney General, State of New York, Attorney for Defendants-Respondents.

TIMOTHY F. O'BRIEN, Asst. Attorney General of Counsel.

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION AND ORDER

This plaintiff-petitioner—and it is very rare—filed a civil rights complaint apparently with payment of the statutory fee on September 29, 1969. Thereafter a motion for bail was filed that I made returnable on October 6, 1969, a regular motion day of this Court held in Albany. In opposition to the motion for bail there has been filed an affidavit of Assistant Attorney General O'Brien. Therein it is stated the complaint was served upon a Deputy Commissioner of Correction on October 2, 1969, and I assume an answer to the claims of the complaint has been or will be filed shortly to put the claims in issue.

It seems from the opposing affidavit to the motion for bail the position taken for the respondents is that a hearing is necessary for decision. It is stated: "* * * and a hearing as to any issues raised by said complaint and answer will conclusively show that the plaintiff-petitioner has not been deprived of any of his civil rights under the United States Constitution, the New York State Constitution or any Federal or State statutes relative to his incarceration in any prison of the State of New York."

In view of this stated position, and also because the plaintiff-petitioner has been pressing for immediate hearing, contending to be entitled to release, a hearing is

hereby fixed to be held in the Courtroom No. 2, Federal Post Office Building, Albany, New York, on Friday, October 31, 1969, commencing at 10:00 A. M. Attorney Richard A. Kohn, 100 State Street, Albany, has commendably agreed to represent the plaintiff-petitioner, and he is hereby duly assigned as his attorney.

There is probably power in this District Court in situations of this kind to grant bail, but it is obvious the power should be sparingly exercised. A Writ of Habeas Corpus Ad Testificandum has been prepared and allowed, and will issue for the production of plaintiff-petitioner at the evidentiary hearing. The motion for bail is denied.

It is So Ordered.

Dated: October 24, 1969, Albany, N. Y.

JAMES C. FOLEY,
United States District Judge.

## District Court Opinion and Order (December 23, 1969).

This typewritten pro se complaint under the Civil Rights statutes is combined with a petition for a writ of habeas corpus. It rarely occurs, but the plaintiff-petitioner forwarded to the Clerk the prescribed statutory fees for filing the complaint and petition. This form of application demonstrates again the ingenuity of state prisoners in following a pattern of a pleading that brought successful results. A similar combined application,—and I had direct contact with the case,—was filed in this Court in Daniel, and U. S. ex rel. Daniel v. McGinnis et al., in 69-CV-118, and was lawyer-prepared by the firm of Rabionwitz, Boudin & Standard, Attorneys in New York City. This same firm recently obtained a preliminary injunction from District Judge Motley, of the Southern District of New York, in Sostre v. Rockefeller et al., 68 Civ. 4058, by decision dated September 4, 1969, for an inmate of Green Haven Prison New York, involving a claim based upon 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983, statutes upon which jurisdiction for this action is based. Judge Motley stated flatly the Court had jurisdiction. Applying the legal principles to be followed in preliminary injunction applications, she ruled that keeping the plaintiff Sostre in segregation for more than a year on account of disciplinary charges may be totally disproportionate to the offenses charged and thus violative of the Eighth Amendment. It was stated that the plaintiff had demonstrated clear probability of success upon a final determination of the merits. The injunction restrained the Warden from holding the plaintiff in punitive segregation and from depriving him of the rights and privileges of the general prison population until final determination was made. The trial has been held, briefing directed, and the matter is under consideration. In the meantime, I understand the preliminary injunction has been complied with and Sostre was released from segregation. Reference is made to this action and the preliminary ruling to indi-

cate again that no matter the reluctance of the past, it is now settled beyond question that claims of this kind alleging federal constitutional deprivation by State prisoners, if not frivolous on their face, are within the jurisdiction of the federal courts under the Civil Rights Act and must be entertained and determined.

This fact should be recognized and accepted, because there is an increasing volume of judicial writing and comment to this effect. It is clear, as so well stated, that we have come a long way from some earlier attitudes toward rights of prisoners. (Jackson v. Godwin, 5 Cir., 400 F.2d 529.) Our own Circuit in Wright v. McMann, 2 Cir., 387 F.2d 519, at page 522, the noted case that involved a New York prisoner confined in segregation at Clinton Prison, remarked that the older cases retain little vitality; that there is no longer any question a state prisoner may bring an action under the Civil Rights Act, citing among other cases, Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030; and that the harshest blow to the old "hands-off" doctrine was struck by Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492. It is settled too that the due process and equal protection processes of the Fourteenth Amendment follow prisoners into prison. Washington v. Lee (D.C.N.D.Ala.), 263 F.Supp. 327, 331; aff'd per curiam, 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212). The Civil Rights statutes, when relied upon for federal jurisdiction, do not require the exhaustion of state judicial remedies. (Houghton v. Shafer, 392 U.S. 639, 88 S.Ct. 2119, 20 L.Ed.2d 1319; D'Amico v. California, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed. 647; McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622; Monroe v. Pape, supra; Wright v. McMann, supra, 387 F.2d at p. 524).

Specifically, in this instance, although the Assistant Attorney General tries to convert the complaint into solely a habeas corpus petition that alone, of course, would entail the usual requirement for exhaustion of state remedies,

to my mind the habeas corpus petition in the combination here is merely a proper adjunct to insure full relief if the plaintiff prevails in the dominant civil rights claim. (See Bell v. Hood, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939; Jones v. Peyton (E.D.Va.), 294 F.Supp. 173; United States ex rel. Stuart v. Yeager (D.C.New Jersey), 293 F. Supp. 1079; 28 U.S.C. §1651). Cases directly in point that sustain in my judgment jurisdiction under the particular, narrow claim and issues raised thereby by this plaintiff-petitioner are: United States ex rel. Campbell v. Pate, 7 Cir., 401 F.2d 55, 57; Landman v. Peyton, 4 Cir. 370 F2d 135; Sewell v. Pegelow, 4 Cir., 291 F.2d 196).

These federal authorities are set forth not as comprehensive review of all the law on the subject. Such federal writings are referred to merely to give several examples that there is full recognition by the federal courts that the primary authority and responsibility for prison administration and discipline remains, and should remain, with the State administrative personnel, and that the federal courts are never inclined to reach out to intrude unless,—and this is an important "unless" that New York should recognize,—there is sufficient showing procedures and regulations exist that impair the constitutional rights of prisoners. (Jordan v. Fitzharris (N.D.California), 257 F.Supp. 674, 680; Baxstrom v. Herold, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620; United States ex rel. Schuster v. Herold, 2 Cir., 410 F.2d 1071; cert. den. 396 U.S. 847, 90 S.Ct. 81, 24 L.Ed.2d 96.) This position is no more than a simple, common-sense one that is in accord with the American desire for fairness within its prison systems and such philosophy has been heralded in this day from a variety of sources. The new Chief Justice of the United States, Justice Burger, in an address to the American Bar Association, called for a comprehensive and profound examination into our penal system from beginning to end, and

among the details he thought should be examined are the standards and programs for release. (American Bar Association News, Vol. 14, p. 5). Chief Judge Lumbard in his concurring opinion in Wright, supra, 387 F.2d at page 527, referred to—and I think recommended in effect to New York—consideration of the hearing procedures and safeguards set forth in the Task Force Report on Corrections, issued in May 1967 by the President's Commission on Law Enforcement and Administration of Justice. (See also State Prisons and the Free Comunity, Judge Jiudice, New York State Bar Journal, December 1969, p. 672.)

The President of the United States a short time ago called for consideration of a ten-year program with enormous appropriations to undertake search for improvements in the federal penal system that may become models for state corrections and prison administrators. Undeniably, change is in the air and the handwriting on the wall is big and black for all to see. States are making important changes in regard to promulgation of effective, fair procedures where withholding, forfeiture and restoration of good time is involved. (Burns v. Swenson (D.C.W.D.Missouri), 288 F.Supp. 4.) To its credit, it was developed at the hearing in this action that effective March 1, 1969, the New York State Department of Correction issued "Revised Procedures Covering Disciplinary Matters". Plaintiff's Ex. 8.) Such enlightened approach is heartwarming to this District Court where increasing numbers of civil rights claims of the kind here are being filed by State prisoners.

I am a firm believer that the blemishes and mistakes in the procedures of the past are best corrected from within by adoption of fair and enlightened regulation and instructions bound to withstand attack in any court, and ultimately lead to the reduction of such alleged grievances. The Governor, the Correction Commissioner and the legal

advisors for the Commissioner of Correction and the Wardens are the ones to lead the way. The best legal advice is that which anticipates difficulty and counsels the corrective measures that will reduce the challenge. A good example is the statement in Wright, 387 F.2d at p. 528 by Judge Lumbard: "The Attorney General has advised us that whatever may be the truth as to the condition of solitary confinement in a strip cell in 1965 and 1966, such conditions do not now exist." Of course, the Wardens, it seems, must have autonomy and wide authority for on-the-spot decisions but no one would contend that Wardens or their deputies should be permitted to become a law unto themselves. I am aware there is at times a guarded, almost hostile, attitude toward federal court intrusion into certain aspects of State Prison affairs. That state of mind is unfortunate and the best way, I think, to dispel it is to advise the lay correction officers, whom I have found to be men of integrity and dedication, that new thinking in the law is prevalent and must be followed.

In this action, there is again set forth as an affirmative Second Defense: "The complaint fails to state a claim sufficient to establish the jurisdiction of this Court over the subject-matter." As I have tried to indicate, in my judgment, the defense is untenable and contrary to established law. Further, it is contended that the claim here regarding conditional release is in the same category as a parole problem. However, as so ably pointed out by the appointed attorney for the plaintiff-petitioner, there are solid and clear differences. Conditional release by express New York law is based upon computation of good behavior time and in my judgment is mandatory grant by its terms and nature if the prisoner so behaves. (See Penal Law, McKinney's Consol.Laws, c. 40, 70.30(4) (a); 70.40(1) (b); 70.40(1) (a). The assertions for the Respondents that to me bear the implication good behavior

time credit may be granted or withheld at the pleasure of the Warden and the Prison Commutation Board is answered by rulings in the New York Courts that such discretionary reductions cannot be arbitrarily withheld. (People ex rel. Stark v. Deegan (1968), 56 Misc.2d 567, 289 N.Y.S.2d 285; People ex. rel. Roy v. Murphy, 36 Misc.2d 501, 233 N.Y.S.2d 282.) New York Courts have entertained these challengers, and it may be that the doctrine of temporary abstention should be applied to veer these challenges into the State Courts where I think they belong. However, and it is a bleak outlook for this 2-Judge District Court, the trend seems to the contrary. (Wright v. McMann, supra, 387 F.2d pgs. 524-525; McNeese v. Bd. of Education, 373 U.S. 668, 673-674, 83 S.Ct. 1433, 10 L.Ed.2d 622; Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed. 2d 444.) Judge Friendly in a very recent writing reviewed the great expanse in the application of civil rights remedies to myriad human problems unthought of in other days (Eisen v. Eastman, 2 Cir., 421 F.2d 560, 11/28/69). Many questions remain unsettled in these actions. In this action my decision which will be adverse to the State provides a vehicle for appeal which I invite and welcome in order that at least some of the questions persistently raised by the State may be answered as correct or incorrect.

The statutes of New York that apply to the grant or withholding of good behavior time are set forth in Section 803 of the New York Correction Law, McKinney's Consol.Laws, c. 43. Such section, subdivision 1, explicitly legislates the requirement that good behavior time credit may be withheld or revoked by the prison board for "bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned." Subdivision 3 of the Section directs the Commissioner of Correction to promulgate rules and regulations in regard to these matters and subdivision 4 says the withholding, forfeiture, cancellation or restoration of such allowances

shall be final and shall not be reviewable if made in accordance wtih law. This subdivision emphasizes for me the right of the Commissioner to be the final authority in these matters if the law is followed and also unquestionably possessing the power to restore the good time as the final administrative reviewing authority. In accord with Section 235 of the Correction Law there is established a Prison Commutation Board with authority to review all cases in which good time has been forfeited by the disciplinary officer and to restore or disallow any such good time revoked. By Section 236 of the Correction Law there is the provision highly important in my judgment in this situation that directs the Board where the allowance is withheld to "x forward with their report to the Commissioner of Correction their reasons in writing for such disallowance x". This direction is contained in the Miscellaneous Rules, 60.6(a), Regulations, Def.Ex. F.

In this action a hearing has been held, a satisfactory record made and transcribed. Plaintiff was sentenced in Bronx County to an indeterminate term of one and one-half to four years on February 14, 1967. The plaintiff-petitioner testified and the Head Clerk at Clinton Prison, Dannemora, New York, was the sole witness for the Respondents. There are a number of exhibits in this record that enlighten as to the inmate and employee rules, and the disciplinary and review procedures in the New York prison system. Also several exhibits have direct bearing on the incidents in which the plaintiff was involved and indicate their follow-up and aftermath through the higher echelon of the Correction officials. The plaintiff-petitioner's attack has been narrowed to 120 days good behavior time credit that was taken from him on October 31, 1968, while he was confined in Sing Sing Prison. The separate disciplinary Action reports dated October 31, 1968 (Def.Exs. A, B) charge in one possession of five con-

traband letters written by his wife in his cell along with other materials, and in the other having six pornographic photographs of his wife in his possession received through illegal channels. The judgment written in each instance is 60 days for a total of 120 days; the brief written comment in one report is plaintiff's refusal to disclose who had arranged to get the contraband into him, the other states he was adamant in refusal to disclose the method by which pornographic materials were passed to him.

The plaintiff's version given at the trial contradicts these disciplinary reports. He testified he was never confronted with written charges or the contraband. From the beginning, and I so find, the questioning was solely in regard to how he got the uncensored letters and photographs into Sing Sing. The punishment effected seems different from the judgment report, inasmuch as the plaintiff says the decision was merely "take him to the Box". (Tr. 29-30.) After a two or three minute oral interview when the plaintiff would not talk, he was told by the Deputy Warden simply, he testified, "I am going to take 60 days for the letters and 60 days for the pictures". (Tr. 31-33.) The following day, plaintiff testified he was then transferred to Clinton Prison at Dannemora, New York, where he was immediately put in and kept in segregation from November to December. (Tr. 36.) The plaintiff testified he was brought before Warden LaVallee several times and told in effect he was an educated man, that the Warden did not like to keep him in the Box although plaintiff did not do anything wrong at Clinton, but he had to be kept there as part of a continuing investigation. (Tr. 44.) Plaintiff testified this pattern continued and when he was brought before the Commutation Board at Clinton Prison, which Warden LaVallee headed, for a review of the forfeiture of his good behavior time, he was again asked only by the Warden if he was going to talk about how letters got into

Sing Sing and when he said he had nothing to say, he was told "to get out". (Tr. 51.) The plaintiff's estimate of the time period for this reviewing board appearance was 30 seconds.

These descriptions undisputed except by the two State report Exhibits give cause for concern that approved and short cut procedures did not permit fair hearing or proper consideration to such extent that would accord with ordinary due process requirements. Of course, it is understandable that maximum security prisons must employ subtle methods at times to insure that the security is not broken by devious schemes to get around the regulations promulgated in the interest of the safety of inmates and correctional personnel. It is also appreciated that summary and swift procedures are necessary to process the day-by-day disciplinary infractions. However, I am not sure the disciplinary officer or an officer of a review board can assume legally the investigative mantle and become prosecutor, judge and jury, and in this instance really the Appellate Court of review. It may be seriously questionable whether refusal to inform can reasonably come under the category of a violation of institutional rules when there is none to such effect. A serious fault, I find, in the reports is that more severe punishment was imposed and inflicted upon the plaintiff than is indicated by the judgment descriptions in them which merely state 60 days loss of good time in each instance.

However, the chief basis for my ruling to uphold the complaint is a complete failure by the prison commutation board to forward as legislatively directed its reasons, in writing, to the Commissioner of Correction for the disallowance of the good behavior time. This board has important responsibilities delegated to it by the New York Legislature because the forfeiture of time assessed by the disciplinary court in the first instance, usually one officer,

is merely a recommendation and it is not until the inmate appears before the prison board that the time credit forfeited is actually reviewed and finally assessed in whole or in part. A most important step therefore in these safeguards, of course, is the direction in Section 236 Correction Law that the board forward their reason, in writing, to the Commissioner when a disallowance is upheld in whole or in part. In this record it is practically admitted that no reasons, in writing, were forwarded to the Commissioner, and I so find. (Tr. 18-20); (see also Pl.Ex. 9 for id.)

My conclusion is that the above omission is substantial and deprived the plaintiff-petitioner of due process and equal protection of the law. My finding are contained herein. My judgment declared hereby is that the disallowance of 120 days and cancellation of 120 days good behavior credit time is void and unlawful as violative of the provisions of the Fourteenth Amendment of the United States Constitution. The Commissioner of Correction of the State of New York, a named respondent, is hereby directed to restore the remaining period of good behavior time credit to the plaintiff. Such allowance will entitle the plaintiff to release forthwith. The release of the plaintiff, of course, will be to parole supervision as required under New York law. If such release is not accomplished within a reasonable time, the attorney for the plaintiff shall submit a writ of habeas corpus to effect such release. I hereby acknowledge my deep appreciation for the outstanding legal assistance given by Attorney Kohn to this Court at the hearing and by his competent and thorough briefing in this difficult and important matter. All exhibits I shall file with this decision with the Clerk of this Court.

Judgment shall enter in favor of the plaintiff granting the relief specifically outlined herein, and this decision is the judgment.

It is so ordered.

## Decision of Court of Appeals Panel Reversing District Court.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 899—September Term, 1969.

(Argued July 16, 1970 Decided March 16, 1971.)

Docket No. 34567

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EUGENE RODRIGUEZ, and the UNITED STATES OF AMERICA *ex rel.* EUGENE RODRIGUEZ,

*Plaintiff-Appellee,*

—v.—

PAUL D. MCGINNIS, Commissioner of Correction; RUSSELL G. OSWALD, Chairman of the Board of Parole; J. EDWIN LAVALLEE, Warden and Chairman of the Prison Board of Clinton State Prison; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTION,

*Defendants-Appellants.*

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Before:

WATERMAN, MOORE and HAYS,

*Circuit Judges.*

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Appeal from a judgment of the United States District Court for the Northern District of New York, James T. Foley, *Chief Judge*, ordering the reinstatement of 120 days good behavior credit withdrawn from appellee while he was a prisoner in a New York State prison.

Judgment reversed.

*Decision of Court of Appeals Panel Reversing District Court.*

RICHARD A. KOHN, Albany, N. Y., *for Appellee.*

BRENDA SOLOFF, Asst. Attorney General (Louis J. Lefkowitz, Attorney General, Samuel A. Hirshowitz, First Asst. Attorney General, Lillian Z. Cohen, Asst. Attorney General, on the brief), *for Appellant.*

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HAYS, *Circuit Judge:*

This is an appeal from an order of the United States District Court for the Northern District of New York in an action brought by a state prisoner under 28 U.S.C. § 1343 (1964) and 42 U.S.C. § 1983 (1964). After an evidentiary hearing, the district court held that the cancellation by defendants of 120 days of plaintiff's earned good behavior time,[1] was unconstitutionally imposed. The defendant Commissioner of Correction of the State of New York was ordered to restore the remaining period of good behavior time credit to plaintiff. As a consequence of this order plaintiff was released from prison on December 24, 1969, although remaining subject to the supervision of the New York Board of Parole. We reverse the judgment of the district court.

In view of the basis for our disposition, only a brief summary of the facts is necessary. Rodriguez, having been convicted in a New York state court of perjury and attempted grand larceny, was sentenced to imprisonment for an indeterminate term of from one and one-half years to four years. Under New York law, a prisoner serving an indeterminate sentence may elect to participate in a con-

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[1] Credit for such time would have reduced appellee's period of incarceration by 120 days.

ditional release program by which he may earn up to 10 days per month good behavior time credit toward the reduction of the maximum term of his sentence. Appellee chose to elect this program. Optimally a prisoner so electing may be released under the supervision of the Board of Parole, after having served but two-thirds of his maximum sentence, Correction Law § 803 (McKinney 1968), Penal Law §§ 70.30(4)(a), 70.40(1)(a) and (b) (McKinney 1967); accrued good behavior allowances so earned, however, may at any time be withdrawn in whole or part for bad behavior or for violation of institutional rules. Correction Law § 803(1) (McKinney 1968).

Appellee was charged in two separate disciplinary action reports, dated October 31, 1968, with possession in his cell of five contraband letters written by his wife, and with having six pornographic photographs of his wife in his possession received through illegal channels. The Deputy Warden adjudged that 120 days of the prisoner's earned good behavior time should be cancelled as punishment, "60 days for the letters and 60 days for the pictures." In the "Remarks" section of each judgment was a statement to the effect that appellee had refused to disclose how he had managed to get possession of the uncensored items. The district judge found that this and various other disciplinary actions meted out to Rodriguez (segregation in Sing Sing for a day and a half, segregation in Clinton Prison for several weeks) were really designed to compel these disclosures from appellee. He believed that the imposition of the penalty was a deprivation of Rodriguez' right to due process because the prison regulations prescribed no penalty for refusal to inform. He further found that the Commutation Board at Clinton Prison, which reviews all cases involving forfeiture of good time, failed to

comply with a statute directing the Board to forward its reasons for the disallowances of the good behavior time in writing to the Commissioner of Correction and he characterized this failure as the chief basis for his ruling. Correction Law § 236 (McKinney 1968). We cannot agree with the trial judge's view that questions of constitutional significance are involved.

Even if we were inclined to affirm the decision on the merits we would be compelled to reverse on the ground that appellee has failed to exhaust his state remedies.

Section 2254(b) and (c) of Title 28 U.S.C. require state prisoners who apply for federal habeas corpus to show that they have exhausted state remedies. State prisoners are increasingly resorting to the Civil Rights statutes in order to circumvent the requirements of Section 2254. The present application, since it seeks release from custody, is in fact an application for habeas corpus. "[R]elease from penal custody is not an available remedy under the Civil Rights Act." *Peinado* v. *Adult Authority*, 405 F.2d 1185, 1186 (9th Cir.), cert. denied, 395 U.S. 968 (1969). In *Johnson* v. *Walker*, 317 F.2d 418, 419-20 (5th Cir. 1963) the court said:

> "Use of the Civil Rights Statutes to secure release of persons imprisoned by State Courts would thus have the effect of repealing 28 U.S.C. § 2254; of course, such was not the intent of Congress."

The "chief basis" of the district court's order is founded on error. The provision of § 236 of the Correction Law under which the prison commutation boards forward their reasons for disallowing good behavior time in writing to the Commissioner of Correction is not constitutionally re-

quired. Moreover, a letter from Warden Deegan to Commissioner McGinnis dated November 1, 1968 (Defendant's Exhibit "C") was sufficient to satisfy the statutory requirement, since it contained all the information that would have been included in a letter from the Board to the Commissioner. In any case, even if the requirement of § 236 had federal significance, the most that appellee would be entitled to is a decree ordering the board to forward a report to the Commissioner.

Although punishment for refusing to reveal the sources of his contraband would not reflect any constitutional infirmity, it is quite clear that Rodriguez did not lose his good behavior time for refusal to inform but for possession of the contraband. After the punishment was ordered he was given an opportunity to reduce his lost good time credit by revealing the source of the contraband. This procedure, commonly used in law enforcement efforts, certainly does not violate any constitutional right.

The issue in this case is typical of the increasing number of trivial questions of internal prison discipline now being brought, in the first instance, before the federal courts. If the results were not so serious for the administration of justice of a federal court of appeals solemnly deciding on the penalty in terms of good time a state prisoner should receive for having dirty pictures in his cell (or for refusing to be a tattle tale) would be so absurd as to be laughable. But if this court entertains actions of this kind it will encourage state prisoners who have any kind of "beef" to bring such actions and the federal courts will end up sitting as prison boards of discipline in the state prisons.

The federal courts should refuse to interfere with internal state prison administration except in the most ex-

treme cases involving a shocking deprivation of fundamental rights. See, e.g., *Church* v. *Hegstrom*, 416 F.2d 449, 450-51 (2d Cir. 1969); *Wright* v. *McMann*, 387 F.2d 519, 528 (2d Cir. 1967) (concurring opinion of Lumbard, *Ch.J.*); *Sostre* v. *McGinnis*, 334 F.2d 906 (2d Cir.), cert. denied, 379 U.S. 892 (1964); *Jackson* v. *Bishop*, 404 F.2d 571, 577 (8th Cir. 1968) (Blackmun, *C.J.*). A case such as the instant one, which is totally devoid of merit, should be dismissed out of hand.

At a minimum such cases should first be filtered through the state prison administrative process and the state courts. In *Wright* v. *McMann*, Chief Judge Lumbard said:

> "We are not called upon this time to decide whether Wright would be heard upon his constitutional claims in federal court without first applying for statutory relief in a state court if the New York legislature had given to inmates of its prisons the right to apply for injunctive relief against improper treatment. I would hold that if a state made provision for such relief in its courts the federal courts should abstain for a reasonable period to allow the state courts to hear the complaint and take appropriate action. I do not agree that recent decisions of the Supreme Court mandate or were intended to mandate action by federal courts in all cases involving the treatment of prisoners in state institutions, without a suitable period of abstention where state courts are empowered to hear the case and where there is reason to believe that the state would grant relief if the complaint were well founded. The disciplining of state prisoners is so peculiarly a matter in the discretion of the state, and the possibilities that prisoners will file groundless and numerous complaints in the federal courts are so obvious, that these cases

raise 'special circumstances' that make it appropriate to treat them as an exception to the caveat or policy against abstention by federal courts."

The prisoner should be remanded to serve the sixty odd days remaining of his sentence, or, if he chooses, to make an application through state administrative or judicial processes for the relief he seeks.

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WATERMAN, *Circuit Judge* (dissenting):

I respectfully dissent. I would affirm the judgment entered in the Northern District of New York.

In this action brought by a state prisoner under 28 U.S.C. § 1343 and 42 U.S.C. § 1983, Judge James T. Foley, Chief Judge of the United States District Court for the Northern District of New York, after an evidentiary hearing in which the prisoner and the state officer defendants testified and presented exhibits, adjudged that the cancellation by defendants of 120 days of plaintiff's earned good behavior time which, if not canceled, would have reduced his period of incarceration by 120 days was unconstitutionally imposed. The district judge therefore ordered that the defendant Commissioner of Correction of the State of New York restore the remaining period of good behavior time credit to plaintiff. As a consequence of this order plaintiff, although remaining subject to the supervision of the New York State Board of Parole, was entitled to an immediate release from prison, and he was so released on Christmas Eve, 1969.

The facts are fully set forth in the able opinion filed below by Judge Foley in *Rodriguez* v. *McGinnis*, 307 F.

Supp. 627 (N.D.N.Y. 1969), and need to be but briefly reiterated for the purpose of this dissenting opinion.

On February 14, 1967, Rodriguez was sentenced in a New York State court to imprisonment for an indeterminate term of from one and one-half years to four years. According to New York law, a prisoner serving an indeterminate sentence may elect to participate in a conditional release program whereby he may earn up to 10 days per month good behavior time credit toward the reduction of the maximum term of his sentence. Optimally, under this program, a prisoner may be released, under the supervision of the Board of Parole, from prison incarceration after having served but two-thirds of his maximum sentence, Correction Law § 803, Penal Law §§ 70.30(4)(a), 70.40(1)(a) and (b), but accrued good behavior allowances so earned may at any time be withdrawn in whole or in part for bad behavior or for violation of institutional rules. Correction Law § 803(1). Appellee chose to elect the conditional release program.

On October 30, 1968, while he was imprisoned in Sing Sing, Rodriguez was charged in a "disciplinary action" report with having in his possession five uncensored, and therefore contraband, letters written to him by his wife. He was similarly charged on the following day with having in his possession six uncensored pornographic photographs. These items were taken from him and turned over to the Deputy Warden. On October 31 it was adjudged by the prisoner's interrogator, the Principal Keeper, the Deputy Warden, that 120 days of the prisoner's earned good behavior time were canceled in order to punish him, "60 days for the letters and 60 days for the pictures." The judgment entered on each of the reports set forth that appellee refused to disclose how he managed to get possession of

the uncensored items.[1] Judge Foley, upon hearing appellee's testimony, discredited the "disciplinary action" reports to the following extent, 307 F. Supp. at 631:

> The plaintiff's version given at the trial contradicts these disciplinary reports. He testified he was never confronted with written charges or the contraband. From the beginning, and I so find, the questioning was solely in regard to how he got the uncensored letters and photographs into Sing Sing.

It is clear that, as Judge Foley found, the real motive behind the continuing pattern of punishment, first the cancellation of the 120 days good behavior time earned by a year's good behavior at Sing Sing, second, the immediate incarceration in the "Box" there for a day and a half, and third, the prompt transfer to Clinton Prison following that incarceration, where the confinement in segregation lasted from entry there on November 1 until the first week in December, was not designed to punish Rodriguez for his possession of uncensored mail but rather was designed to

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[1] The pertinent notations as to the letters follow:

JUDGMENT

60 days....

Remarks: Inmate refuses to disclose who had arranged to get the contraband letters to him.

/s/ R. Treanor
Deputy Warden

letters held in Warden's office.

The pertinent notations as to the photographs follow:

JUDGMENT

60 days. Inmate was adamant in refusal to disclose method by which the pornographic photographs were passed to him.

Remarks:

Pictures held in Warden's office.

/s/ R. Treanor
Asst. Superintendent

compel him to disclose the channel through which he obtained the uncensored items, or, as the majority says, to "tattletale."

Judge Foley also found that the Commutation Board at Clinton Prison, which reviews all cases in which good time has been forfeited by a disciplinary officer, failed to obey the command of the New York statute, and did not forward in writing to the Commissioner of Correction its reasons for withholding appellee's good behavior time. Correction Law §§ 235, 236.

Based on the above, the experienced district judge expressed concern that this pattern of events may well not have comported with "ordinary due process requirements" and stated, ". . . I am not sure the disciplinary officer or an officer of a review board can assume legally the investigative mantle and become prosecutor, judge and jury, and in this instance really the Appellate Court of Review." 307 F. Supp. at 632. I share his concern.

The judge indicated, also, that "the chief basis" for his decision was the failure of the prison commutation board to forward the reasons for its action to the Commissioner and that this failure deprived appellee of due process and equal protection of the law. *Id.*

Had Judge Foley found that the prison authorities had only proceeded against Rodriguez by confronting him with a charge of violating prison rules in that he possessed uncensored items, had given him a full opportunity to answer only those charges, and then had failed to forward to the Commissioner of Correction the reasons for taking away good behavior time as punishment for the infractions, I would not consider such a statutory violation to constitute such a deprivation of due process as to warrant a federal tribunal in granting relief. However, on the facts found by Judge Foley, it is my belief that this panel has no other valid option but to conclude that the procedures ap-

pellee was subjected to in relation to the uncensored mail did not meet the minimum constitutional requirement of "fundamental fairness."

Rodriguez began his drawn out confrontations with prison officials over a simple infraction of prison rules, the possession of uncensored material. Although he was "officially" charged with that simple infraction, official attention soon focused on Rodriguez's refusal to "tattletale" and to incriminate others who might have aided him in receiving the contraband.[3] It is apparent from the severity of

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[3] Rodriguez testified as to the initial Sing Sing confrontation as follows:

> I was in the visting room. My wife was visiting me, and an officer came over and told her that the visit was terminated. She left. I was told to remain. A few minutes later, the officer took me to the Warden's office. . . . The Warden said to me "How did you get these uncensored letters into Sing Sing?"
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> * * * * *
>
> I told him I had nothing to say. He then summoned somebody else and told him "Take him to the box."

Rodriguez testified with reference to the second confrontation at Sing Sing that he was taken from the box to the Deputy Warden's office by a guard. The colloquy follows:

> He said to me, the first thing he said to me, is "Look, Gene, I know that it is a waste of time asking you anything, but I want to know how uncensored letters got into Sing Sing." I said, "I have nothing to say." He said—he then said, "If you don't tell me I am going to take sixty days for the letters and sixty days for the pictures, to run consecutively." I didn't say anything. He then said, "I can give you back this lost time, give you back all your lost time." I said, "I have nothing to say."
>
> Q. Now is that the end of the conversation with the P.K.? A. That was it.
>
> Q. And how long were you in this room, total time? A. Oh, wait, there was something else that was said. He said, "You are being transferred to Clinton." He said, "You are being transferred to Clinton, Gene, tomorrow." I said, "Thanks for telling me." Then he said, "Good luck to you." I said,

his punishment, first, the wiping away of a year's accrued credit for a year's good behavior and the resulting assessment of four months additional incarceration, and second, segregation "in the Boxes" of the two prisons for a total of more than 40 days, that the punitive measures were not inflicted for possession of uncensored letters and photographs but in order to coerce him to tattletale and to divulge information that would inculpate other residents of Sing Sing.

It would seem, then, that the failure of the commutation board to forward its reasons for its actions was merely a part of the pattern of continued procedural dereliction Judge Foley found, and, as the facts he found are not clearly erroneous, and, on the record, I am not convinced

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"Good luck to you." We shook hands and I walked out. I was there two minutes or maybe three minutes.

Upon his arrival at Clinton Prison Rodriguez testified that he was immediately taken away to the box there without any further hearing. As to the confrontations at that prison, Rodriguez testified:

> While I was in the box on three separate occasions the Warden weekly would have me brought up to his office. . . . The Warden would have me brought up to his office and he said to me—what he did was this. He said "Sit down." When I sat down he said, "Look, you are an educated man. . . ."
>
> The Court: How often did he do this/
>
> The Witness: He did it three times.
>
> The Court: All right.
>
> The Witness: He did it three consecutive weeks. He said, "Look, you are an educated man." The first time "I want to know how the unauthorized letters got into Sing Sing. I don't like to keep you in the box. You didn't do anything at Clinton but I have to as part of the continuing investigation." I said, "I have nothing to say." He said, "You are going to continue to lose good time and you are going to stay in the box." He said, "We have it narrowed down to two men anyway, so that if you tell us you will save yourself all this aggravation." So I answered him, I said, "Well, if you have it narrowed down to two men, then you don't need me."
>
> So he had me taken out.

that Judge Foley made any mistake in finding the facts as he found them, I approve the conclusion that he necessarily drew from these facts that the coercive procedures adopted by the prison authorities to obtain Rodriguez's confession did not comport with the due process the accused, then a prisoner in custody, was entitled to.

Although not raised before the court below, or considered there, appellee urges us to hold that the imposition of this punishment because he remained silent in the face of interrogation was a violation of his fifth amendment privileges against self-incrimination, citing *Spevack* v. *Klein*, 385 U.S. 511 (1967). The defendants respond by pointing out that Rodriguez at the hearing before Judge Foley admitted having the uncensored items in his possession and that his refusal to talk was not motivated by any fear of criminal prosecution for possessing the items. This is most assuredly so as to the possession of the contraband, but the prison authorities' questions were not directed at seeking a confession with respect to the contraband; no confession was necessary or needed, he was "caught with the goods." The questions were directed at discovering how the letters and photographs were smuggled past prison censors. The obvious import of the interrogation was the discovery of the identity of the "insider" or "insiders" (prison guards, etc.) who must have enabled Rodriguez to receive the uncensored items. Had Rodriguez answered the prison officials and implicated certain persons employed by the prison, he would also, of course, be implicating himself in the conspiracy to circumvent censorship and he could reasonably expect further developments to follow any disclosure he might make.[4] The ramifications

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[4] See N.Y. Penal Law § 20.00 and, for example, N.Y. Penal Law § 200.00.

of the interrogation were twofold. The information sought would not only open the door for a probable criminal charge against a prison official but also, as Rodriguez would also be a party to the official's criminal act, a possible criminal charge against Rodriguez.[4]

Rodriguez may have been motivated to remain silent solely because of a fear of retaliation by his confederate, whether a prison guard or other prison employee, or even another inmate. But the fifth amendment protection protects irrespective of the subjective motives that prompt one to be silent. If the information sought by officers may tend to incriminate one who is being questioned, he has an absolute right to remain silent. Although "[a]nswers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying," *Gardner* v. *Broderick*, 392 U.S. 273, 276 (1968), (citing cases), no immunity from prosecution was offered in this case to Rodriguez. Nor is it any answer to say that if Rodriguez had talked under the compulsion of the threats of segregation in the box and the loss of good time credits such compulsion would have rendered his statements or the fruits thereof "coerced" and therefore inadmissible against him in a criminal prosecution. See *Garrity* v. *State of New Jersey*, 385 U.S. 493 (1967). Absent an assurance that his statements could not be used against him, we cannot assume appellee was aware of any implicit immunity he would enjoy if criminal charges for a complicity in violation of law were brought against him. Cf. *Gardner* v. *Broderick, supra* at 278-279.

I would point out, therefore, that under the circumstances present in this case the fifth amendment privilege against

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[4] See, e.g., among several penal provisions, N.Y. Penal Law §§ 195.00, 195.05, 200.00, 200.20, 205.20.

self-incrimination was a bar to the punishment imposed—punishment which obviously was not imposed for the possession of uncensored letters and photographs but imposed solely for the purpose of compelling appellee to divulge incriminating information. However, the pertinence of the fifth amendment's protection was not brought to the attention of the trial court and I find it unnecessary to uphold the decision below by reliance upon it. With reference to the issue that it was presented to Judge Foley, his factual findings are not clearly erroneous and his conclusion drawn therefrom that appellee was deprived of due process seems to me to be incontrovertible. I would affirm.

## Denial of Petition for Rehearing.

A petition for a rehearing having been filed herein by counsel for the appellee.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

LEONARD P. MOORE
PAUL R. HAYS
Circuit Judges

I would grant a rehearing on points I and III of the petition. See my March 16, 1971 dissent as a panel member, pp. 4751-4759 of 1969 Term slip sheets.

STERRY R. WATERMAN
Circuit Judge

July 19, 1971.

## Michael Katzoff
## Docket Entries.

(United States District Court, Northern District of New York, 70 Civil 272)

| DATE | PROCEEDINGS |
|---|---|
| 1970 | |
| Aug. 6 | Filed Petition for Writ of Habeas Corpus and related papers |
| " 6 | Filed Order to Show Cause returnable Aug. 11, 1970 at 2:00 p.m. at Auburn, N.Y., order that petition and supporting papers be filed without prepayment of fees, and that service of copy of Order on defendants and Louis J. Lefkowitz, Atty Gen. by mail shall be due and sufficient service |
| " 6 | Writ Issued & del'vd to Marshal for service |
| " 7 | Filed Return of Marshal re service of Writ of Habeas Corpus on John T. Deegan, Warden of Auburn Prison on Aug. 7, 1970 |
| " 11 | Return of Order to Show Cause. Petitioner testified in his own behalf. Continuance to August 18, 1970 at 2:00 P.M. in Auburn (Trial) |
| " 18 | Filed photostatic copy of Respondent's Exhibit A—Disciplinary Action 1/9/69 |
| " " | Filed photostatic copy of Respondent's Exhibit B—Disciplinary Action 1/9/69 |
| " " | Filed photostatic copy of Respondent's Exhibit C—Disciplinary Action 1/9/69 |
| " " | Filed photostatic copy of Respondent's Exhibit D—Disciplinary Action 1/9/69 |

## *Michael Katsoff Docket Entries.*

| DATE | PROCEEDINGS |
|---|---|
| 1970 | |
| " " | Filed photostatic copy of Respondent's Exhibit E—continuation sheet of disciplinary action |
| " " | Filed photostatic copy of Respondent's Exhibit F—re release date |
| " " | Filed photostatic copy of Respondent's Exhibit G—Disciplinary Action 1/7/69 |
| " " | Trial continued from August 11, 1970. The respondent is directed to restore 30 days good time taken from petitioner for writing in his diary. To restore 20 days good time lost due to segregation. The respondent to correct error in their record keeping which allowed petitioner 10 days not entitled to. Petitioner to be released forthwith. Two day stay to allow separation from Prison. Stay terminates at 12 noon on the 20th day of August, 1970. |
| " " | Order—Port, J. directing Respondent to release petitioner from Auburn State Prison, said release is stayed until not later than noon August 20, 1970 to permit the proper and necessary processing of said petitioner's release—ORDERED—Edmund Port, U.S.D.J. |
| " " | Judgment |
| " 20 | Notice of Appeal |
| " 25 | Minutes of Proceedings held August 18, 1970 at Auburn, New York |
| Sept. 4 | Transcript of proceedings held Aug. 11, 1970 at Auburn, N.Y. |

## *Michael Katzoff Docket Entries.*

(UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, DOCKET No. 35300)

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 8-19-70 | Filed order granting motion for a stay until 12:00 noon, 8-21-70; hearing on motion to be had at 11:00 a.m. 8-21-70; motion papers and response to be filed on or before 10:00 a.m. 8-21-70 |
| 8-21-70 | Filed motion for a stay |
| 8-21-70 | Filed affidavit in support of application for a stay |
| 8-21-70 | Filed affidavit in opposition to motion for a stay |
| 8-21-70 | Filed order that application for a stay is denied; brief of respondents-appellants be filed by 8-31-70 and that the brief of petitioner-appellee be filed by 9-10, which briefs may be in tw; appeal is set for argument week of 9-14-70; in the event the Michael Katzoff refused to agree in writing as above provided, the application for a stay is granted pending the termination of the appeal as above provided |
| 9-2-70 | Filed brief, appellants with proof of service (mailed 8-28-70) |
| 9-9-70 | Filed application & order advancing the argument of appeal to 9-17-70 |
| 9-10-70 | Filed record (original papers of district court) |
| 9-14-70 | Filed order granting late filing of a separate appendix for appellant |

*Michael Katzoff Docket Entries.*

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 9-14-70 | Filed copies appendix (Mailed 9-4-70) with proof of service |
| 9-14-70 | Filed brief, appellee with proof of service (mailed 9-10) |
| 9-17-70 | Argument heard (by: Friendly, Smith & Hays, CJJ) |
| 10-1-70 | Filed supplementary brief, appellee with proof of service |
| 3-29-71 | Judgment Reversed Hays, CJ |
| 3-29-71 | Dissenting in separate opinion, Smith, CJ |
| 3-29-71 | Filed judgment (VACATED 1-25-72) |
| 4-12-71 | Filed petition for rehearing and rehearing in banc with proof of service |
| 7-19-71 | Filed order denying petition for rehearing |
| 7-19-71 | Filed order granting reconsideration in banc, etc.; the in banc proceedings in the three cases are consolidated; if petitioners desire to file further briefs, they may do so by 8-16-71; if respondents desire to file further briefs, they may do so by 9-13-71; further oral argument will not be heard unless otherwise order (consolidated with 34567 and 35253) (Filed in 34567) |
| 10-12-71 | Filed order re in banc—judges of the court and members of the respective panels who have taken senior status will hear oral argument 11-4-71 at 2 PM Room 506; if counsel desire to file additional briefs on these subjects these should be served and filed by 11-1-71 (& in 35253, 34567) (filed in 34567) |

## *Michael Katsoff Docket Entries.*

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 11-1-71 | Filed brief, petittion on rehearing in banc with proof of service |
| 11-1-71 | Filed brief, appellant (on rehearing) with proof of service (Filed in 34567) |
| 11-4-71 | Argument heard (by: Friendly, ChJ, Waterman, Moore, Smith, Kaufman, Hays, Feinberg, Mansfield, Mulligan, Oakes & Timbers, CJJ) (& in 35253 and 35300) |
| 2-10-72 | Issued Mandate (judgment; opinion on rehearing and order) |

## Affidavit of Poverty.

STATE OF NEW YORK }
COUNTY OF CAYUGA } ss.:

MICHAEL KATZOFF, being duly sworn and deposed, hereby states that:

1.) I am a citizen of the US, and am confined at the Auburn State Prison, Auburn, New York 13022.

2.) That because of my poverty, I am unable to prepay the fees for the said action or suit, and that I am a poor person.

3.) That I am unable to give security for the same, and that I own no real property.

4.) That I believe I am entitled to the redress I seek in this action.

5.) That I make this affidavit in good faith, and out of the necessity of preserving the constitutional rights effecting life and liberty.

6.) That I am seeking issuance of a writ of habeas corpus against Paul D. McGinnis, Commissioner of Corrections, and John T. Deegan, Warden, to compel them to show cause why an additional forty days of "good-time" should not be restored to me, thereby effecting my immediate release from custody. The above mentioned officials, or their subordinates, shall be made to appear before this Court, and either affirm or deny petitioners allegations, as annexed hereto, and grant the specific redress requested by the petitioner.

7.) That a "Subpoena Duces Tecum" shall be issued to Warden Deegan, or his representative, for his appearance, and for the production of petitioner's dis-

ciplinary records, and any information at his disposal pertaining to the case in point.

8.) That an order be issued to Warden Deegan, to produce petitioner Michael Katzoff, in court, and allow him to bring all legal papers, notes, law books, personal property and clothing, as shall be necessary, and to be provided with an appropriate suit of clothing to dress in, for court appearances, pursuant to Article 10-c of the Criminal Code of Procedure.

9.) That he is a poor person, after such provision defining such status: "28 U.S.C., Section 1915, Adkins v. DuPont Co., 335 US 381" and prays for the above relief as soon as humanly possible.

Respectfully submitted,

MICHAEL KATZOFF
Petitioner

Sworn to before me this
28 day of July, 1970.

N.P. CLARENCE G. STANTON
Notary Public, State of New York
Qualified in Cayuga County #1343
Commission Expires March 30, 1972

## Affidavit in Support of Show Cause Order.

CIVIL

Comes now the petitioner,, Michael Katzoff, presently encarcerated at the Auburn Prison, under a sentence of 1-3 yrs. for Possession of a Weapon, sentenced by Justice Schweitzer, of the NYS Supreme Court, NY County, on June 17, 1968. Indictment No. 3999/67.

first, being duly sworn under oath, deposes and says; that I am the petitioner in the above entitled action, and seek leave to file the attached affidavit, and as such, I have prepared this Petition to Proceed in forma pauperis, and know the contents to be true, under Penalty of Perjury.

The jurisdiction of this Court is invoked pursuant to 28 USC, Section 1343(a) for enforcement of rights.

May it please this honorable Court, that petitioner herein, brings this application for writ of habeas corpus and order to show cause, under Title 28, Sect. 1651, to compel the respondents to show cause, sufficient in law, why they, or their representatives, should not be made to appear before this honorable Court, to either deny or affirm petitioner's allegations, as annexed hereto.

MICHAEL KATZOFF
(Petitioner)

Sworn to before me this
28 day of July, 1970.

CLARENCE G. STANTON
Notary Public
State of New York
Qualified in Cayuga County 1343
Commission Expires March 30, 1972.

*Affidavit in Support of Show Cause Order.*

**No Previous Application For The Relief Sought Herein Has Been Made To Any Court.**

I *Statement of facts:*

I, Michael Katzoff, was initially encarcerated on June 17, 1968, at which time I began keeping a daily diary, on the suggestion of my attorney, Mr. Benjamin Glass. I was confined to Sing Sing Prison from July 1, 1968, until August 12, 1968, when I was transferred to Clinton Prison. During the month and a half I was at Sing Sing, I was questioned by Deputy Warden Trainor, and one sergent, with regards to the diary. Both commented that "it was a good way to blow off steam, and was an excellent form of self-analysis. At Clinton, the diary was known of due to my introducing its use to my group discussion leader and Parole Officer, the latter, who was giving me individual counseling. Furthermore, as I wrote my daily entries in the yard, in full view of everyone, it was not something I was doing on the sly. Prison officials at Clinton made remarks similar to those at Sing Sing.

In the latter part of November, 1968, I was transferred to Green Haven Prison, where I continued to maintain the diary daily. When I arrived, and had my belongings unpacked, the two officers commented upon the diary, as it was now four notebooks in since they checked with a sergent, and I was then told "if these diarys mention the actual names of other inmates or prison employees, you won't be able to take it with you, when you go home." But there was no mention of there being anything wrong with maintaining the diary, or its being a violation of any departmental or institutional rule. All comments made were of a basically humorous nature, due to the accuracy in which I described the diary was written.

On January 7, more than six weeks after my arrival at Green Haven, I was informed that I was "keep-locked" pending my appearance in "P.K. court" the following day.

I was not told why I was keep-locked. (I asked several officers, and was simply told, "you'll find out tomorrow.)" As my cell was in a state of disarray, and all of my diarys were missing, I assumed this was the basis of the situation.

On Wednesday, January 8, 1969, I was brought before the Deputy Warden, Mr. Gilligan, who, after calling me a torrent of vile and obscene names, simply said "Take this Jew bastard to the Box, I'll see him when I get around to it." Ergo, I was sent to solitary confinement, without knowing why, what I was charged with or how long I would be there. I was handcuffed, and roughly pushed along the prison corridors leading to the elevator, and up to the segregation facility.

On Friday, January 10, 1969, I was brought before Mr. Gilligan again this time in a small room within the seg. facility. He again launched a verbal diatribe against me, and this time said "I'm sentencing you to solitary indefinitely, and revoke 12 days of good time from you!" I was not told what, if any, specific charges were responsible for my being put into solitary, but when I asked, I was told things like "worry about important things, like going home alive rather than in a pine box, or having a lobotomy performed due to emergency needs, etc."

I later learned that, on Friday, January, my brother came to visit me, and was denied entry, because a) I was not allowed visitors during the first 30 days, and b) he had been removed from my visitor's & correspondent's list. He saw the warden, got his explanation of my present circumstances, and then contacted my attorney, and family, regarding same.

I remained in solitary for two months, which caused an additional loss of 20 days good time. My attorney and family spoke with the Warden (Follotte) Deputy Wardens (Gilligan and Sawner) and several Dept. of Corrections Officials, in an effort to gain my release from solitary. They were, on several occasions, told the basic reason(s) why I lost the good time, and was put into segregation, and these

reasons were, specifically:

1.) Mentioned, in diary, that "Asst. Deputy Warden Sawner's a cigar-smoking S.O.B."

2.) Mentioned, in diary, that "Deputy Comm. Cain is a creep."

3.) Mentioned, in diary, the thought of asking my brother to bring in a recording device to take a visit —this was considered to be a conspiracy.

4.) Pasted my inmate's rule book into my scrapbook which was considered "destruction of State Property."

Each of the above charges cost 30 days of good time.

My attorney informed me that, according to the research he had done, my Maintaining a diary, regardless of what I write in it, could not be considered a violation of any rule, either. Departmental Or Institutional, as no rule existed which could, in any way, relate to that situation. His belief was that, when I saw the "Commutation Board", *All* of the good time lost, regarding this episode, would be returned.

I appeared before the Commutation Board on 2/11/70, and was told that 100 of the 188 days I'd lost, were returned. I wasn't allowed to speak during this appearance, and the decision had obviously been made some time prior to that time.

On 2/12 I received a carbon copy of the report that was sent to the Commissioner, regarding my "hearing". On the reverse side was the explanation for the good time loss, supposedly quoted from the original disciplinary reports, the "Diary Episode" reports now read:

1.) writing diary containing derogatory remarks about Officers and administrative Officials—90 days.

2.) Had brother bring in tape recorder that would not be detected by the Metal detector at the gate—30 days.

Apparantly, the original charges have been re-written, the charge pertaining to the rule book dropped, the "conspiracy" with my brother becomes an act already committed, and the "derogatory remarks" become vague and non-specific.

Any attempts, on my part, to obtain specific information regarding the lost time, appealing to the warden for a chance to disprove or refute the charges, etc., were met with silence. A letter I wrote to the commissioner, was never received by him apparantly because it was never mailed by the Prison Officials who worried about it's contents, and my ability to prove same.

II

The 14th Amendment, which has been held to be applicable to the State Courts, states in pertinent part, "That no state of the U.S. shall abridge the privileges and immunities of citizens of the United States, nor deprive any persons of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

*Title 28 U.S.C., Section 1343* states: The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: [3] to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the U.S., or by an act of Congress providing equal rights of citizens, or of any persons within the jurisdiction of the United States of America.

III *Exhibits:*

1. Affidavit from Irving Anolik, Attorney-at-Law.
2. Affidavit from Mr. Hyman Kruglack.
3. Affidavit from Mrs. Elaine, Katzoff.
4. Affidavit from Mr. Paul Katzoff.

5. Carbon copy of commutation Board's report to the commissioner of corrections, dated 2-11-70.

IV *Conclusion:*

Petitioner is well aware of the so-called "discretionary powers" that are granted to Prison Administrators, necessary for maintaining security and discipline. These Powers are akin to those of a judge, who meets out justice in accordance with the severity of the case at hand. The major difference being that the judge must observe very definite minimum and maximum punishment, which are carefully spelled out in the Penal Code. The Prison Administrators, on the other hand, have no such guide-lines to follow. Ergo, these "discreationary Powers" often become dictatorial Powers, and justice becomes non-existant, or runs according to whim and/or state of mind, etc.

In the brief accompanying this writ, petitioner has outlined the numerous ways in which he was denied equal protection/treatment, of the laws, and a denial of due process, according to the laws set down by the NYS legislature and the Dept. of Corrections.

Petitioner prays this honorable Court and God almighty, for justice, and that an order to show cause be issued and a hearing be granted.

Respectfully submitted,

Michael Katsoff
In person, petitioner
136 State St., Auburn, NY 13022

Sworn to before me this
28 day of July, 1970.

NP: Clarence G. Stanton
Notary Public,
State of New York
Qualified in Cayuga County
Commission Expires March 30, 1972

*"Subpoena Duces Tecum."*

IN THE US DISTRICT COURT FOR THE NORTHERN DIST. OF N.Y.

To: John T. Deegan, 2nd
Paul D. McGinnis, or
their representatives.

You are hereby commanded to appear in the US District Court for the Northern District of New York, at the Federal Building, Utica, New York, on the day of , 1970 at 10:00 am in the forenoon, to testify in the case of USA ex Rel Michael Katzoff, Petitioner, vs. Paul D. McGinnis and John T. Deegan, Respondents, and bring with you:

1) the disciplinary report regarding to the charges and actions taken, as outlined herein

2) the Original Commutation Board report to the Commissioner, regarding the restoration of good time, and the deferral of Petitioner's release date, as a result thereof.

2) Any and all records pertaining to Petitioner's disciplinary actions *while at Green Haven Prison.*

This Subpoena is issued upon application of the above named Petitioner.

/s/ .....
USDJ

## Order to Show Cause.

The Clerk of the court has presented to me a petition and supporting papers in the above-entitled proceeding, together with an application at proceed forma pauperis.

The petitioner alleges that "good time" has been taken from about due process of law. He alleges that if the "good time" to which he claims entitlement was credited to him, he would be conditionally released immediately.

He combines with his petition for injunctive relief an application for a writ of habeas corpus.

An affidavit submitted with the petition indicates that copies of all the papers herein have been served upon the Attorney General of the State of New York, by mail, by the petitioner through the prison authorities.

Upon the petition of Michael Katzoff, verified the 28th day of July, 1970, it is

ORDERED that the petition and supporting papers herein be filed by the Clerk without prepayment of fees; and it is further

ORDERED that Paul D. McGinnis, Commissioner of Corrections of the State of New York, John T. Deegan, Warden of Auburn State Prison, and Hon. Louis J. Lefkowitz, Attorney General of the State of New York, show cause before a Special Session of this court, appointed to be held in the United States District Courtroom in the United States Post Office Building and Court House, Auburn, New York, on the 11th day of August, 1970, at 2:00 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, why an evidentiary hearing should not be held before this court to determine the petitioner's right to the relief sought, or such other relief as may be just and proper; and it is further

*Order to Show Cause.*

ORDERED that service of a copy of this Order upon the said Paul D. McGinnis, Commissioner of Corrections of the State of New York, John T. Deegan, Warden of Auburn State Prison, and Louis J. Lefkowitz, Attorney General of the State of New York, by depositing the same in a securely postpaid wrapper, addressed to the said persons by United States mail, on or before August 5, 1970 shall be due and sufficient service.

EDMUND PORT
United States District Judge

Dated: August 5, 1970
Auburn, New York

## Excerpts from District Court Hearing.

* * *

The Court: But this is the point of the situation, if the Court were to wait until the pleadings were framed, the whole matter would become moot.

Mr. O'Brien: He is scheduled to be released in September.

The Court: September 2, he says.

Mr. O'Brien: Yes.

The Court: Why didn't you apply for this relief back in February?

Mr. Katzoff: Well, Your Honor, approximately two and a half months ago I was visited at Auburn Prison by my attorney, and he mentioned the statement to me at that time that I was not aware of before, and the statement in essence is this, that he had spoken on several occasions, more recently than the inception of this situation, so called diary episode, with personnel of the Department of Correction in Albany. In other words, he has cases there periodically and he knows these people. He was supposedly told, and I quote, that the maintaining of a diary per se is not a violation of any departmental or institutional rule or regulation, therefore the entire incident should be ruled as moot. I was not aware of anything to this extent. (pp. 11-12)

* * *

The Court: Of course, supposing you put a man in segregation unlawfully, you are going to lose good time, put him in the day he comes in the institution and keep him there, he will never get a chance to earn his good time, will he?

Mr. O'Brien: Then he of course would have to resort to the civil rights act and get his relief in that manner. (pp. 41-42)

* * *

*Excerpts from District Court Hearing.*

The Court: This case presents a situation that unfortunately doesn't afford the court an opportunity to perform any lengthy study. If the plaintiff or the petitioner here is entitled to any relief, it would for the most important purposes, at least, become moot if I were to take the matter under advisement and try to give it the kind of study and analysis that either Judge Motley did in the Sostri case or Judge Foley did in Rodriguez or Kripski, or that Judge Mansfield did in the Carouthers case. Those cases were brought at such a time so that they permitted of that period of study and lengthy and scholarly opinions which will be passed on by the Court.

I think I have got to take a much more pragmatic approach here. For that reason I am going to adjourn now —recess, rather I should say, for not more than an hour. I will recess until 4:30. I have got my notes of the testimony and I would like also the exhibits, and I will make my determination and announce it on the record.

(Thereupon a recess was taken, after which the hearing was resumed.) (pp. 152-153)

• • •

## District Court Opinion (August 18, 1970).

The following proceedings took place on the 18th day of August, 1970 at the United States District Court, Northern District of New York, Federal Building, Auburn, New York before Hon. Edmund Port, United States District Judge.

Appearances:

Michatel Katzoff, in person and by Lee S. Michaels, Esq., Attorney for Petitioner.

Hon. Louis J. Lefkowitz, by Timothy O'Brien, Esq. of counsel, Attorney for Paul D. McGinnis, etc. The Capitol, Albany, New York.

The Court: I am going to ask the reporter to transcribe the proceedings from this point on and they will constitute the decision of the Court, the Findings of Fact and the Conclusions of Law, and when the same are transcribed they are to be filed with the Clerk.

This is a proceeding brought by Michael Katzoff, Petitioner, against Paul D. McGinnis, Commissioner of Corrections and John T. Deegan, Warden of Auburn State Prison. I believe that since the institution of the action, or shortly before the institution of the action, the Correction Law was amended, or it was amended earlier and effective shortly before this time, changing the title of the Warden to Superintendent, and the State Prisons to Correctional Facilities, is that correct, Mr. O'Brien?

Mr. O'Brien: That's correct, Your Honor.

The Court: All right. The title of the action will be considered amended accordingly.

After hearing the testimony, the arguments of counsel and of the parties, on due consideration, the Court makes the following Findings of Fact:

1. The Petitioner is confined in the Correctional Facility at Auburn, New York, formerly known as Auburn State

Prison, in execution of a sentence of one to three years imposed by the Supreme Court of New York County on or about June 17, 1968; that at various times since then the Petitioner has been confined in Dannemora State Prison, Green Haven State Prison and Auburn State Prison in execution of the sentence. In addition, the Petitioner was confined in Sing Sing Prison.

It is the practice in the prison system of New York on the admission of an inmate, or shortly thereafter, to prepare an inmate record card, referred to as a warden's card or deputy warden's card, copies of which are kept on file in the warden's office and in the deputy warden's office. As part of that record, and in the early part of the execution of the sentence, the prison authorities determine and post on the card the maximum expiration date and the conditional release date for the particular inmate. In the case of the Petitioner, his maximum expiration date is June 14, 1971. His conditional release date was fixed as June 14, 1970. That date is the date upon which he will be entitled to conditional release under the provisions of the Penal and Correction Laws of the State of New York if he duly applies for such conditional release.

The Petitioner in this case has duly and timely applied for conditional release.

Throughout a prisoner's incarceration, in the event of disciplinary action taken against him by the institution resulting in a loss of good time, that so-called loss of good time is added to the tentative conditional release date. In the first instance, the institutional procedure provides for a determination of judgment on disciplinary action which is tentative. Those tentative judgments are subsequently reviewed by a Prison Board who makes a recommendation to the Commissioner with reference to the restoration of good time which has been tentatively taken away from the prisoner under disciplinary judgments.

The prison or institution Board, to determine the good time allowances to be made to the Petitioner, met on or about February 11, 1970 and made a report to the Commissioner of Correction, a copy of which is designated as Respondents' Exhibit F, and a copy of which was also attached to the petition herein.

During the Petitioner's incarceration on a number of occasions he was disciplined as a result of alleged infractions of prison rules. The disciplinary judgments material to this proceeding all occurred on or about January 7, 1969, or January 9, 1969, except for a judgment on or about September 1, 1968, which resulted in the loss of ten-days good time, and a judgment of March 24, 1969, which resulted in a loss of thirty days good time. The judgments resulting in the loss of good time on those two occasions is not seriously questioned. The ten-day loss of good time with reference to the offense on or about September 1, 1968 of making pass in the visiting room was admitted not to be an issue by the Petitioner in open Court. With reference to the offense of pasting a list on an already approved list of books, charged on March 24, 1969, and resulting in the loss of thirty days good time, I find that the charge was properly made, prosecuted and the loss of good time did not result from any violation of any constitutional rights of the Petitioner.

On or about January 7, 1969, the Petitioner was charged while an inmate at Green Haven Prison, the charge is contained in Respondents Exhibit G and reads as follows—"It is a report to the Warden on a form used by the prison indicated to be GHP and headed 'Disciplinary Action'."

In substance, it charges Katzoff, the Petitioner, with writing a diary containing derogatory statements about the administration of this institution, and making statements in his diary about his sexual desires towards Miss Kelly and Mrs. Pendleton, who are employed here. "It

would appear that this inmate would force his attentions on the above-named women if the opportunity would arise."

I find that that charge was made against the Petitioner, that he pleaded guilty to it and that the judgment was that he be confined in segregation, without a stated time limitation, that ninety days of good time was lost or taken away from him, and the diaries were confiscated. As a matter of credibility, the Petitioner from his appearance, gentle demeanor, background, interest, does not impress the Court. I find that there is no rule or regulation of any of the institutions of the State of New York that prevent the keeping of a diary. I find that this diary was commenced with the prisoner's first incarceration, which I believe was at Sing Sing; that portions of the diary were taken with him from Sing Sing to Dannemora, from Dannemora to Green Haven State Prison before they were confiscated.

I find that the prison officials subject all entering inmates to a careful scrutiny in addition to their persons, to the belongings with which they come. The officials at all of the institutions at which these diaries were maintained knew of the diaries prior to the time that they were confiscated and the time the Petitioner was charged with their maintenance as a violation. There is no evidence that the contents of the Petitioner's diaries was in any way publicized by him or published among the prison population. The recording in the diary on the basis of the proof in this case constituted nothing more than the recording of the thoughts of the Petitioner. The Prison Board, in considering the lost good time assessed for infractions, considered a total of 160 days plus 28 days not earned. The 28 days not earned result from the inability of a prisoner to earn good time under certain conditions, such as being sent to segregation or keep locked, I believe, as a disciplinary measure. Of the 28 days the Petitioner lost on that basis,

only 20 days is in issue in this case. The time assessed for infractions of 160 days considered by the Prison Board and on which they made their recommendations to the Commissioner include 30 days loss of time defined on the back of Exhibit F, the report to the Commissioner "Had brother bring in tape recorder that would not be detected by metal detector at gate." I am satisfied that the prison authorities in setting up that charge were referring to the charge made on January 9, 1969 against the prisoner, evidenced by Respondents' Exhibit B. That Exhibit indicates that the charge was "a conspiracy to violate visiting rules," and I am reading, "in that this inmate did conspire (as shown by his own diary) with his brother, Paul, to have brought into the visiting room a recording device and that he did instruct Paul to check with an electronics firm in New York City as to the possibility of obtaining a recording device that could not be detected by the metal detector at the front gate." The judgment on that charge as recorded on the disciplinary action report is "Brother Paul is removed from visiting and corresponding list."

I am satisfied that the error on the back of the report to the Commissioner in indicating 30 days lost time for that violation results from a misreading of the inmate's record card, also referred to as the warden's card, because the charge that I have just read occupies 2 lines on that card and the 30 days "LT" is below those 2 lines and opposite an entry headed 1-9-69 VanVlack Writ and Dep. Comm. Cain in Imp. and derog. manner. Thirty days "L.T."

The entry as interpreted in this manner is supported by the disciplinary report, Respondents' Exhibit D, which relates to the charge that I have just read and commences writing about "Dep. Comm. Cain in an imp. derog. manner" and indicates a guilty plea with a judgment of guilty and thirty days lost time. Consequently, I am satisfied that the entry relating to the brother on the back of the report to the Commissioner is an error.

There is no evidence that the diary or that portion of it relating to the derogatory remarks about Deputy Commissioner Cain in which he was called a creep in the diary, was published to any of the prison population.

Mr. O'Brien: Would you mind making a finding with respect to the fact that employees, correction officers of the prison, did however read this information?

The Court: Yes, I so find, and I will give you an opportunity when I am through to supplement the findings.

The important thing with reference to calling the Deputy Commissioner a creep, however, is that there was no reference to that in the report to the Commissioner, that is, that is where the confusion between interpreting the inmate's record card and the individual disciplinary action slips arose.

Pursuant to the judgment relating to the charge of January 7 as indicated in Respondents' Exhibit G, the Petitioner was confined to segregation for approximately two months; that as a result of the two-months confinement in segregation, the Petitioner suffered a loss of twenty days good time.

I may be repeating myself, but at the risk of doing so, the Prison Board met on or about February 11, 1970 and restored 100 days out of 188 days of good time tentatively taken away from the prisoner. They stated as their reason: "Continuous disciplinary reports. See over." I find that in considering the number of proceedings that are handled, that while the reason is terse, it is adequate to advise the Commissioner of the reason for not restoring all of the good time, or for restoring that part that was restored.

Now I think that covers the factual situation in the case. Do either counsel have any suggested amendments or additions to the proposed order or to the findings as I have just dictated them?

Mr. Michaels: No, your Honor.

Mr. O'Brien: I have no such requests to make.

The Court: All right. Now I am going to the Conclusions of Law.

The Court has jurisdiction of the action pursuant to 42 U. S. Code, Section 1982, 28 U. S. Code, Sections 1343(3), 1651 and 2241, etc.

The petition is being construed with the liberality to which a *pro se* petitioner in prison is entitled. I regard it as a petition alleging a violation of his civil rights and asking for writ of *habeas corpus* as incidental to the enforcement of any judgment to which he might be entitled if the issuance is necessary.

Due process, of course, is related to the circumstances concerning which it is applied. In the case of prisoners, recognizing the necessity of the authorities to maintain discipline, recognizing their expertise and recognizing the desirability of avoiding interference with their administration of the prison system, the degree of due process to be applied is of a minimal nature. I feel that the procedural due process under the circumstances, on the basis of the evidence I have heard was not established by the Petitioner to be insufficient.

However, regardless of the amount of due process, to which he is entitled, a minimum would require that he not be punished for acts which are not a violation of any prison rule or regulation. I am satisfied that the rules and regulations that govern the management of our penal institutions have been drawn by experts and have been drawn in sufficient detail to cover in some manner any act which would be disruptive of the good discipline, management and purposes of the institution, and when the respondents fail to point to any regulation which is violated, then the person has not been afforded due process under that charge.

In addition, the writing in a diary, unpublished, to my mind is little different than thinking thoughts, I can't con-

ceive of the thinking of any thoughts being the basis of disciplinary action on the part of the prison officials.

Assuming that there were regulations that prohibited the keeping of diaries—and I find there are none—segregation for that offense, unpublished, for 60 days would constitute under the decided cases cruel and unusual punishment. As a result, the twenty days that was lost by the Petitioner resulting from the segregation, that was taken from him in violation of his rights to due process and equal protection of the law under the Fourteenth Amendment, to punish him at all for thinking would violate his First Amendment rights.

I conclude that the charge set forth in Exhibit G resulting in 90 days lost time deprives the Petitioner of his constitutional right to equal protection of the law and due process.

I conclude that the charge concerning writing derogatory matter, in an improper and derogatory manner about Commissioner Cain, and for which 30 days lost time was taken, violates the Petitioner's constitutional rights to due process and equal protection of the law.

I conclude that the Petitioner is entitled to a judgment directing the respondent Commissioner to restore the 90 days lost time—

Mr. O'Brien: It has already been restored, Judge.

The Court: I am aware of that, to restore the 90 days—

Mr. O'Brien: May I ask the purpose of the direction:

The Court: I think it will become clear if you permit me to finish.

Mr. O'Brien: I am sorry.

(The Reporter read back the last paragraph as above recorded.)

The Court: —resulting from the charge set forth in Respondents' Exhibit G and to restore the 20 days lost time which resulted from the two months in segregation imposed

as punishment for the charge set forth in Respondents' Exhibit G and for the 30 days lost time imposed as a result of the charge contained in Respondents' Exhibit D.

The determination of the Commissioner that the respondent was entitled to the restoration of 100 days good time—

Mr. O'Brien: The Court please, it is not a determination of the Commissioner, it is a determination of the Prison Commutation Board.

The Court: Well, my understanding is that they merely recommend to the Commissioner.

Mr. O'Brien: No, they do not, the Prison Commutation Board makes the determination and merely sends in a report giving reasons to the Commissioner for such determination. It is not a recommendation.

The Court: Then I will phrase the judgment—the respondents or the officers or agents acting under their authority should be directed to correct the records to reflect the corrections in the loss of good time made in these conclusions. In doing so, it is understood that the respondents have already granted to the Petitioner the 90 days relating to the charges contained in Respondents' Exhibit G—is that your position?

Mr. O'Brien: Well, I don't go along with the Court's—what do you mean?

The Court: I mean it is your position that he shouldn't be credited with the 90 days twice?

Mr. O'Brien: My position is the Court is ruling on something here which doesn't require a ruling.

The Court: I don't want to give him credit for time that he didn't lose twice. Now, is it your position that he has already, by action of the Prison Board, received credit for the 90 days lost time?

Mr. O'Brien: Yes, your Honor, in fact in his petition he asked for a maximum of 40 days, and the Court here is ruling on 90 days, and the proof is undisputed that this

90 days that a disciplinary officer imposed, was wiped out by a Prison Commutation Board.

The Court: All right, if that is the position of the State, of the respondent, then I don't want to confuse the records or give them credit for it more than once.

Mr. Michaels: Your Honor, just so—I conferred with Mr. Katzoff, I believe we could stipulate to that.

The Court: All right, stipulate to what?

Mr. Michaels: That we are talking about the same time that has already been restored to him.

The Court: All right, if it has been restored it has been restored and that is so stipulated?

Mr. Michaels: Yes.

The Court: All right. So that it is stipulated then that the only good time in issue here is the 20 days of lost good time resulting from the confinement in segregation and the 30 days imposed—well, it wasn't 30 days imposed on the conspiracy—the 30 days imposed in relation to Deputy Commissioner Cain.

Mr. Michaels: That is the position of the relator, your Honor.

The Court: Is that correct? If there is any question about it, read the statement back.

(The Reporter read back the above statement as recorded.)

Mr. O'Brien: I believe that's right your Honor, 30 days that was imposed upon him for writing these derogatory remarks about Commissioner Cain, that was a punishment wherein 30 days lost time that he had conceivably already earned was taken away from him.

The Court: All right.

Mr. O'Brien: And since the 90 days, the other punishment so far as good time is concerned that was taken away from him, was 90 days for this other activity, combination, I believe, that having been restored, the only

other point in issue would be the 20 days that he lost as the result of being in segregation for 60 days and not being able to earn 1 day of good time for every 3 days.

The Court: So what is in issue then is the 20 days, the 90 days and the 30 days, that would be a total of 140 days, and the State's contention is that they have already credited 100 days against that?

Mr. O'Brien: And that has been stipulated to, I believe.

The Court: That has been stipulated, is that correct?

Mr. Michaels: We stipulate to the 90 days—I believe 110 came in as something else, I think the 10 days was picked up from something else.

The Court: That is the 90 and 20, it is 110.

Mr. Michaels: I don't have the Exhibit in front of me. I recall 90 and 10 having been restored, I don't remember where that 10 days was restored from.

Mr. O'Brien: That was the one making the pass, on which there is no dispute, so he got the benefit of that without asking for it.

Mr. Michaels: I agree with your Honor. I don't agree on the exact arithmetic.

The Court: I don't want any equivocation, I want to know what is stipulated so I can draw conclusions. As I understand it now, it is stipulated that the lost time in question is the 20 days of lost time resulting from the segregation, the 90 days of lost time resulting from the charges of Exhibit G and the 30 days of lost time resulting from the charges in Exhibit D, which make a total of 140 days. That 100 days have been credited, leaving 40 days at issue, is that correct?

Mr. Michaels: Yes, we agree with that.

The Court: Is that the stipulation now?

Mr. O'Brien: Well—

The Court: I am not trying to make the stipulation, I am trying to find out what it is.

Mr. O'Brien: Actually, Judge, I am afraid you get a little far afield here, because as far as the restoration, if the Court is relying on this Exhibit here, the 90 days that was restored to him on the back here includes within it the charge of writing a diary containing derogatory remarks about officers and administration officials, and not 30 days as is indicated on this specific single charge.

The Court: No, that charge has 90 days, it fits in with the item. What I am trying to do is sort these items out. The 90-day charge is a 1-7-69 charge. The disciplinary action of 1-7-69 describes that same thing, writing a diary containing derogatory statements about the administration of this institution, and so forth, and it is 90 days. Now that fits the Exhibit G and it fits the warden's card. That 90 days is no problem.

Mr. O'Brien: Of course the State's position here is that these mere notations on the back of this Exhibit here do not have the force and effect of these disciplinary reports.

The Court: That is exactly—

Mr. O'Brien: It is merely a notation made by some clerk to total up the time.

The Court: That is exactly the finding I make. I find that this is an error because it doesn't correspond with specific charges.

Mr. O'Brien: But our position is that even if it is a clerical error it isn't such an error that the Court should consider in arriving at its determination with respect to whether or not this individual has been afforded his rights under the Constitution.

The Court: I am not, except that by putting something on the back of this slip—for instance, the brother, the charge relating to the brother is recorded on the back of this Exhibit as 30 days. Now, I find as a fact that there was no such penalty imposed in relation to the brother.

In relation to the brother it says: "Judgment. Brother Paul is removed from visiting and correspondence list."

Mr. O'Brien: What the Court is doing is delving into the record-keeping practices of the New York State Department of Correction and is being very critical and is basing his determination on a typographical or record-keeping practice.

The Court: No, my determination is not based on that.

Mr. O'Brien: Not upon the question of rights.

The Court: Just the contrary.

Mr. O'Brien: It would seem the other way to me.

The Court: Just the contrary. My determination is based on the facts, not the errors, and I am not being critical. If it appears that way, I want to correct the record, because in a prison institution that has the number of proceedings that they have over here in Auburn, if they made any fewer mistakes it would be a source of wonderment, not if they made more.

Mr. O'Brien: As a matter of fact, during the course of the hearing I think your Honor also discovered that 10 days credit was given to this individual erroneously.

The Court: That's right, and I am not taking that—

Mr. O'Brien: Perhaps the Court should correct that error.

The Court: I will.

Mr. O'Brien: And impose—

The Court: I intend to.

Mr. O'Brien: All right.

The Court: I don't intend to perpetuate errors, that is just what I am trying not to do. Now what I want to know is, to get back to my original question, is that the stipulation, that what is involved here is the 90 days' penalty that goes along with Exhibit G. If you refer to the exhibits, I think it will make it easier. In other words, it is the diary charges that I am finding don't constitute a charge.

Mr. O'Brien: But it is this same charge or the punishment therefor that was forgiven *in toto*, that is why I think the Court need not make a determination.

The Court: I am going to make a determination.

Mr. O'Brien: This I don't understand.

The Court: Well, I am not concerned about that. What I am concerned about is whether or not we have got a stipulation here of any kind so that I know what we are stipulating.

Mr. O'Brien: I would be willing to stipulate that insofar as this petitioner is concerned, the only thing that he stands deprived of in respect to time that he was entitled to earn would be a period of 30 days and a period of 20 days. That is all I can see, and I would be willing to stipulate to those items. I won't stipulate that he should get them back.

The Court: No. Well, you are saying exactly what I have been saying right along, 30 and 20 is 50, not 40.

Mr. O'Brien: But you are asking me for a stipulation. I will stipulate to that, too.

The Court: All right. I will add to my findings of fact, in view of counsel's statement, counsel for the respondent, that the Prison Board restored 90 days of good time which was taken away as the result of charges contained in Exhibit G, and in addition, 10 days of good time which was taken away as a result of a charge on or about September 1, 1968 of making a pass in the visiting room, of 10 days; is that the State's contention?

Mr. O'Brien: That's correct, your Honor.

The Court: All right. Then that clears the situation up. Now I will have to—I hate to bore you with a reading of this, but in order to put it in some kind of sequence I don't know what kind of a judgment I have ordered. Now, will you read that back from where I started to make my conclusions of law?

(The Reporter read back as directed.)

The Court: All right, now change that and take that out. The colloquy should remain.

On the basis of the stipulation of respondent's counsel that the 90-days good time which was taken away from the prisoner by reason of the charges contained in Exhibit G was restored by action of the Prison Board, it will not be necessary to again restore that good time, although the judgment violated the Petitioner's rights, constitutional rights. He is entitled to a judgment directing the restoration of the 30-days lost time resulting from the charges contained in Respondents' Exhibit D for the same reasons that relate to the charges contained in Respondents' Exhibit G. He is also entitled to a judgment restoring the 20-days lost time resulting from his being in segregation for a period of 60 days pursuant to the charges contained in Respondents' Exhibit G. Accordingly, he is entitled to a judgment requiring the appropriate officials to recompute his lost or his good time and conditional release date, by giving him credit for the 20 days and the 30 days hereinabove referred to.

In determining that release date, the authorities and respondents are not to be bound by an apparent error that was made in calculating his release date as September 2, after giving him 100 days restoration of good time.

The findings of fact should include a finding that the Prison Board determined that the revised release date was September 2, 1970. This was an obvious error in computation. The revised date, according to the testimony should have been September 12.

In order to be more than fair with the prisoner, the prison authorities retained the release date as September 2, 1970, knowing that was an error, by reducing the days of lost time resulting from confinement in segregation from 28 to 18. It is not the intention of the Court to perpetuate

any errors, but to have the authorities compute a correct release date based on the credits to which the Court has found the prisoner entitled. According to the Court's computation, by restoring 20-days good time referred to and the 30-days good time referred to, the prisoner would be entitled to conditional release at once, is that correct, Mr. O'Brien? I think it is quite obvious.

Mr. O'Brien: I believe that is correct, your Honor, and even assuming that the 10 days was placed back on.

The Court: I am assuming that.

Mr. O'Brien: Yes, the conditional release date would be the first week in August.

The Court: Some time early in August, yes.

Now let me ask you, it is apparent from what I have said that a judgment should be entered directing his release, that is, on conditional release subject to the provisions of the conditional release forthwith. Now I am appreciative of the fact that you just can't—I assume there is some kind of processing that has to be done. Now, can that be completed by tomorrow?

(Discussion held off the record.)

The Court: All right then, I will find, I will adjudge that he is entitled to a judgment under which he is entitled to his release forthwith, the judgment to be stayed for not more than 2 days to give the prison officials the opportunity to go through the necessary processing.

I will prepare an order right now and have it served on you. That is what I propose doing. I wouldn't want you to act otherwise.

Now, are there any suggestions in relations to the findings or conclusions?

Mr. O'Brien: I would like to take an exception.

The Court: You are given an exception to everything I have said from the minute I opened my mouth. You have got an exception to everything I said.

I am wondering if there ought to be any corrections to anything I have said or anything that I have omitted.

Mr. O'Brien: I don't wish to prolong—I don't know whether I will get a hotel room—but I was wondering if your Honor overlooked one of these charges here with respect to conspiracy to smuggle in the tape recorder, and if your Honor would make a finding on that and say that—

The Court: I think I did.

Mr. O'Brien: I don't recall that. Did you find that that was cruel and unusual punishment?

The Court: No, I found that the charge was placed and that the judgment was that brother, Paul, is removed from the visiting and correspondence list in accordance with Respondents' Exhibit B. That was the judgment. On the back of the slip when they referred to it—that is what I was trying to get at, on the back of the report when they referred to 30 days for that violation, it was clearly an error. It doesn't jive with any of the records, but it is an understandable error because the record card is so crowded.

Mr. O'Brien: Well, I know, but with respect to your findings of fact, your Honor has found that writing scurrilous things about a Deputy Commissioner is not a violation of any rule, and may be committed, this act may be committed freely by any inmate of a State prison without the imposition of any penalty therefor, if I understand your finding.

The Court: With reference to the conspiracy to violate the visiting rules, the whole matter is moot because the only punishment imposed—

Mr. O'Brien: I am talking about the writing of scurrilous—you made a specific finding of fact that writing scurrilous remarks in the diary is the same as thinking them.

The Court: That's right.

Mr. O'Brien: And even conceding that prison employees who may see this, and whose morale may be affected by it, for instance, a correction officer may come across a diary which he might have to look into for security purposes, which was done here—

The Court: I don't think I have any such evidence. The only evidence I have got is that they did look at it.

Mr. O'Brien: I don't wish to try the case over, but—

The Court: I made the finding—now a minute ago you were talking about the recording device, that is disposed of because it was moot.

Mr. O'Brien: The bringing of the diary is moot, that was my point.

The Court: No, it isn't, because that related as well to Commissioner Cain. There was an addition of 30 days.

Mr. O'Brien: I would like to request the Court for a five-day stay to enable the respondents to apply to the Second Circuit for a stay.

The Court: I will stay it for 2 days that I have stayed it in order to permit the prison authorities—that is, today is Tuesday, it is stayed until Thursday noon to permit the prison authorities the opportunity to process the prisoner and get him on parole.

Mr. O'Brien: Would your Honor be willing to give us until Thursday noon to make application to the Second Circuit for a stay?

The Court: I don't think you need my permission, but I can't see any need for a stay. The man is going on parole, you can always pull him back.

Mr. O'Brien: Judge Motley stayed her decision.

The Court: I don't think Sostre was ready to get out. I don't think he will be ready to get out for a long time.

Mr. O'Brien: In any event we may apply to the Second Circuit?

The Court: Certainly. If a judge of the Court of Appeals feels this order should be stayed, there is nothing to

prevent you from getting a stay. As a matter of fact, I am not as sensitive as the prison authorities, you can do it and call me a few names at the same time.

Mr. O'Brien: We wouldn't do that, but I am wondering if we would have an order to go to the Second Circuit with by Thursday noon.

The Court: I don't know about that. He is on parole. Suppose it was September 2, you would let him out and he would be on parole, and if he violated it you would get him back. If the judgment is to be stayed, I think you have time enough to get it. In any event, I will treat this as an application for a stay and it is denied beyond the time granted.

Now, gentlemen, if I can impose on you for just a few minutes I will go in Chambers and dictate a judgment so that—this will be a very short judgment.

Mr. O'Brien: Like a writ of habeas corpus, I suppose.

The Court: It will be a direction and a judgment and direction so that the officials, so that the warden will have something to act on.

(Discussion held off the record.)

The Court: Here's what you can do on the exhibits. Let it appear that the attorney for the respondent and prison officials have asked for the original records. I have xeroxed copies which are a little better than the wet copies that you have. I will substitute those for the originals with the understanding that if the originals are needed in the Court of Appeals that they will be supplied, of course.

(Thereupon, a short recess was taken after which the hearing was resumed.)

The Court: Let the record show that I am handing to the Clerk for filing an original judgment signed by the Court in this matter, together with a signed copy for filing with the Clerk's office.

*District Court Opinion (August 18, 1970).*

The Clerk is directed to file the same. I also have copies for counsel. I want a copy for Mr. Grattan, I want a copy for the Petitioner, 3 additional copies, and I ask you to certify them and then deliver them to the parties now. That should take care of your requirements, Mr. Grattan.

I will direct the Clerk to serve a certified duplicate original copy of the decree on Mr. Grattan, certified copy on counsel for the respondents and a certified copy on the counsel for the Petitioner for the Petitioner's use.

Let the record show that the service was done in accordance with the Court's direction, and we stand adjourned to Chambers.

This is to certify that the foregoing record is a true and accurate transcript of the proceedings had at the time and place noted in the heading hereof.

MARTIN L. MILLER
Official Reporter
United States District Court
Northern District of New York

## Order of August 18, 1970.

Upon all the proceedings had herein and after hearing the testimony and the arguments of the parties and their attorneys, and the court having dictated the findings of fact and conclusions of law on the record, and having directed that they be transcribed and filed with the Clerk of the Court, it is

ORDERED, ADJUDGED and DECREED that the respondents restore to the petitioner upon petitioner's records the following good time in addition to the 100 days restored by the prison board:

1. Twenty days of lost good time resulting from being placed in segregation for a period of about two months commencing on or about January 8, 1969,

2. Thirty days of lost good time resulting from charges contained in respondent's Exhibit D, dated January 9, 1969, relating to the maintenance of a diary, and it is further

ORDERED, ADJUDGED and DECREED that the respondents correct the records to indicate the conditional release date of the petitioner in accordance with the restoration of the above good time, and it is further

ORDERED, ADJUDGED and DECREED that the respondent John T. Deegan, Warden of Auburn State Prison, now designated as Superintendent of Auburn Correctional Facility be directed to release the petitioner from said institution or facility pursuant to the statutes, rulings, and regulations governing the release of an inmate on conditional release forthwith, and said release is stayed until not later

than noon August 20, 1970 to permit the proper and necessary processing of said petitioner's release.

S/ EDMUND POST
United States District Judge

Dated: August 18, 1970, Auburn, New York

"I certify that
This is a true copy
Attest 8/18/70
J. R. SCULLY
J. R. Scully
Clerk, U. S. District Court

By: .....
Deputy

[SEAL]

## Decision of Court of Appeals Panel Reversing District Court.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 255—September Term, 1970.

(Argued September 17, 1970 Decided March 29, 1971)

Docket No. 35300

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UNITED STATES OF AMERICA, *ex rel.*
MICHAEL KATZOFF,
*Petitioner-Appellee,*

—v.—

PAUL D. McGINNIS, Commissioner of Corrections of the State of New York, and JOHN T. DEEGAN, Warden of the Auburn State Prison, Auburn, New York,
*Respondents-Appellants.*

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Before:

FRIENDLY, SMITH and HAYS,
*Circuit Judges.*

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Appeal from a decision and order of the United States District Court for the Northern District of New York, Edmund Port, *Judge*, ordering under 42 U.S.C. § 1983 (1964) the reinstatement of 50 days good behavior credit withdrawn from appellee while he was a prisoner in a New York State prison and directing his release in accordance with the laws and regulations of New York.

Reversed.

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*Decision of Court of Appeals Panel Reversing District Court.*

HERMAN SCHWARTZ, Buffalo, New York (Lee Michaels, Auburn, New York, on the brief), *for Appellee.*

LOUIS J. LEFKOWITZ, Attorney General of the State of New York Timothy F. O'Brien, Assistant Attorney General, on the brief), *for Appellants.*

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HAYS, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Northern District of New York in an action brought by a state prisoner under 42 U.S.C. § 1983 (1964). Following an evidentiary hearing, the district court found that the loss of 50 days of appellee's earned good behavior time was unconstitutionally imposed. The appellant Commissioner of Corrections of the State of New York was ordered to credit the 50 days of good behavior time to appellee and appellee was ordered released in accordance with the laws and regulations of New York. We reverse the judgment of the district court.

Appellee Katzoff was sentenced to three years imprisonment following his conviction in a New York State court for illegal possession of a dangerous weapon. Under New York Correction Law § 803 (McKinney 1968 & Supp. 1970) and Penal Law §§ 70.30(4)(2), 70.40(1)(a) and (b) by McKinney 1967), prisoners are allowed to participate in a conditional release program by which they may earn up to 10 days per month good behavior time credit toward reduction of the maximum term of their sentences. Optimally, a prisoner so electing may be released under the supervision of the Board of Parole after having served approximately two-thirds of his maximum sentence (i.e., 20 days out of every 30). Good behavior allowances, however, may be

withdrawn at any time in whole or in part for bad behavior or for violation of institutional rules. N. Y. Correction Law § 803(1) (McKinney 1968).

In January 1968 while incarcerated in Green Haven prison, Katzoff's diaries which he was keeping with the knowledge of the prison authorities were taken away from him and examined. Disciplinary charges were brought against him for describing Deputy Commissioner Cain as a "creep" and a "cigar-smoking S.O.B." and for indicating in vulgar language his desire to have sexual intercourse with two nurses at the prison. Deputy Warden Gilligan deprived Katzoff of 30 days good time for these diary entries and confined him in segregation for 57 days. Katzoff ultimately lost 50 days earned good behavior time because of the diary entries—30 days penalty for his remarks as to Deputy Commissioner Cain and 20 days by not being able to earn any good time while in segregation.

The district court ruled, after holding an evidentiary hearing, that there was no regulation against the keeping of a diary (a fact conceded by the State) and that punishment for entries in a private diary violated appellee's constitutional rights to due process, equal protection of the law, and freedom of thought. The court also found that sending appellee to segregation for writing in his diary constituted cruel and unusual punishment and ordered that the prisoner be immediately credited with 50 days earned good time. Since this restoration of good time entitled Katzoff to immediate conditional release, the court on August 18, 1970 ordered entry of a judgment directing the prisoner's release within 2 days. Appellants' application to this court for a stay was denied after appellee agreed in writing that if the district court order were modified or reversed and resulted in additional time to be served, then appellee would surrender to serve such additional time.

We find it necessary to consider the merits of appel-

lee's constitutional arguments, for we find that appellee has failed to exhaust his state remedies as required by 28 U.S.C. § 2254(b) (Supp. 1959-1967) and therefore reverse the decision of the district court.

Although the district court stated that it regarded appellee's petition as alleging a violation of his civil rights and asking for a writ of habeas corpus only as incidental to the enforcement of any judgment which might issue, we find that appellee in seeking release from custody was in essence applying for a writ of habeas corpus. There is no basis for limiting the concept of habeas corpus to attacks on custody because of defects in the original conviction as distinguished from a failure to allow release according to law. "[R]elease from a penal custody is not an available remedy under the Civil Rights Act." *Peinado* v. *Adult Authority of Department of Corrections*, 405 F.2d 1185, 1186 (9th Cir.), cert. denied, 395 U.S. 968 (1969); *Johnson* v. *Walker*, 317 F.2d 418, 419-20 (5th Cir. 1963). In our recent opinion in *Rodrigues* v. *McGinnis*, Docket No. 34567, filed March 16, 1971, containing a similar application by a prisoner, we stated that the "present application, since it seeks release from custody, is in fact an application for habeas corpus."

As an application for a writ of habeas corpus, the petition is defective because there is no allegation that appellee exhausted his state remedies in accordance with the requirements of 28 U.S.C. § 2254(b) (Supp. 1959-1967). Katzoff has made no application whatsoever to the state courts, and there is no showing that an adequate state remedy is not available. There is no reason to believe that the New York courts are not fully equipped to decide whether New York prison officials may impose the discipline in question here under New York law (Correction Law § 236 (McKinney 1968)), and the New York and Federal Constitutions. Appellee's argument that the proxim-

ity of the prisoner's release renders state processes ineffective to protect his constitutional rights assumes without justification that state courts will be less responsive to a constitutional claim than the federal courts. There is no authority for the proposition that the proximity of release relieves a prisoner of the exhaustion requirements of Section 2254(b).

Reversed.

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SMITH, Circuit Judge (dissenting):

I respectfully dissent. I would not bar a civil rights action for failure to exhaust state remedies because of the exhaustion requirement of 28 U.S.C. § 2254(b). The appellant is not attempting to challenge the validity of his sentence as in *Johnson* v. *Walker*, 317 F.2d 418 (5 Cir. 1963) or *Peinado* v. *Adult Authority*, 405 F.2d 1185 (9 Cir. 1969).

The recent *in banc* opinion of this court in *Sostre* v. *McGinnis*, —— F.2d —— (2d Cir. 1971), squarely holds that where a state prisoner is deprived of statutory good time as a penalty for his conduct, at least in a case involving first amendment rights, the federal courts have the power to order that it be restored. To make the availability of this remedy turn on the fortuitousness of the prisoner's timing in filing his section 1983 claim makes no sense in terms of either logic or judicial efficiency.

A civil rights plaintiff is entitled to choose a federal forum. If relief such as restoration of good time earned has the incidental effect of entitling him to immediate release, it should not deprive him of that choice. *McNeese* v. *Board of Education*, 373 U.S. 668, 672 (1963); *Bell* v. *Hood*, 327 U.S. 678, 683 (1946); *Damico* v. *California*, 389 U.S. 416 (1967); *Hancock* v. *Avery*, 301 F. Supp. 786 (M.D. Tenn. 1969); *Edwards* v. *Schmidt*, 321 F. Supp. 68 (W.D. Wisc. 1971).

## Denial of Petition for Rehearing.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY
Henry J. Friendly

PAUL R. HAYS
Paul R. Hays Circuit Judges

July 19, 1971.

I dissent. I would grant the petition.

J. JOSEPH SMITH
U.S.D.J.

**John Kritsky**
**Docket Entries.**

**(UNITED STATES DISTRICT COURT,**
**NORTHERN DISTRICT OF NEW YORK,**

69 Civil 276)

| DATE 1969 | PROCEEDINGS |
|---|---|
| Aug. 11 | Filed Complaint and Petition for a Writ of Habeas Corpus |
| Sept. 3 | Filed Affidavit of Poverty |
| Sept. 8 | Filed Memorandum-Decision and Order—Foley, D.J. granting application to proceed in forma pauperis particularly the service fees which he is unable to pay. It is So Ordered —James T. Foley, U.S.D.J. |
| Sept. 8 | Issued Summons—1 Orig. and 6 Copies and delivered to U. S. Marshal for service |
| Sept. 16 | Filed Notice of Motion for an Admission to Bail, Affidavit in support of Motion for Plaintiff-Petitioner in his request for bail and Affidavit of Service by Mail |
| Sept. 18 | Filed Application for Bail |
| Sept. 18 | Filed Memorandum-Decision and Order—Foley, D.J. returnable October 6, 1969 at Albany, N. Y. The Clerk of the Court is directed to add the motion to the motion calendar for that date. It is So Ordered—James T. Foley, U.S.D.J. |
| Oct. 2 | Filed Summons served September 29, 1969 on John R. Caine, Deputy Commissioner of Correction for Paul D. McGinnis, Commissioner of Correction; served September 29, 1969 on Russell G. Oswald; served Sept. 30, 1969 on Frank Ryan, Head Clerk, for J. Edwin LaVallee, Warden, served September 29, 1969 on Russell C. Oswald, Chair- |

*John Kritsky Docket Entries.*

| DATE 1969 | PROCEEDINGS |
|---|---|
| | man of the Board of Parole, New York State; served September 29, 1969 on John R. Caine, Deputy Commissioner, New York State Department of Correction; served September 30, 1969 on Frank Ryan, Head Clerk for J. Edwin LaValle, Chairman of the Prison Board |
| Oct. 6 | —Filed Affidavit of Defendants-Respondents in Opposition to Motion for Bail |
| Oct. 6 | —Filed Petition for bail etc. |
| Oct. 6 | —Motion for Bail. Decision reserved |
| Oct. 16 | —Filed Affidavit of Service of Affidavit on John Kritsky |
| Oct. 16 | —Filed Answer of Defendants |
| Oct. 16 | —Filed Affidavit of Service of Answer personally on John Kritsky |
| Oct. 29 | —Filed Memorandum-Decision and Order—Foley, D.J. denying motion for bail. An evidentiary hearing is to be held November 14, 1969 at Albany, N. Y. at 10 A.M. Richard A. Kohn, Esq. is appointed as counsel for plaintiff-petitioner. A Writ of Habeas Corpus Ad Testificandum will issue for production of plaintiff-petitioner at the hearing. It is So Ordered—James T. Foley, U.S.D.J. |
| Oct. 29 | —Writ issued and delivered to U. S. Marshal for service |
| Nov. 6 | —Filed Writ of Habeas Corpus Ad Testificandum served November 4, 1969 on Harold Corcoran, Deputy Warden for J. Edwin LaVallee, Warden |
| Nov. 14 | —Filed inquiry re motion pending application for bail (phone HPK) |

*John Kritsky Docket Entries.*

| DATE 1969 | PROCEEDINGS |
|---|---|
| Nov. 17 | —Trial. Return of Writ of Habeas Corpus—hearing under Civil Rights. Mr. O'Brien moves to dismiss complaint on grounds stated. Decision reserved. The Court directs that record be transcribed at cost of government. 3 weeks to file and exchange briefs after receipt of transcript—1 week to reply. |
| Nov. 25 | —Filed Transcript of Hearing held November 14, 1969 at Albany, N. Y. |
| Jan. 12 | —Filed Memorandum of Law on Behalf of Defendants-Respondents |
| Jan. 30 | —Filed Memorandum on Behalf of Plaintiff |
| Feb. 11 | —Filed Stipulation to correct stenographic errors in transcript of hearing, and letter from Judge Foley re same |
| Feb. 11 | —Filed Order correcting Transcript of Hearing, Foley, DJ, and copy of Judge Foley's letter of Feb. 10, 1970 re same |
| June 15 | —Filed Plaintiff's Exhibit No. 1 (State of N. Y. Department of Correction Notice of Election Under Correction Law Section) |
| June 15 | —Filed Plaintiff's Exhibit No. 2 (Clinton Prison Interdepartmental Communication) |
| June 15 | —Filed Plaintiff's Exhibit No. 3 (Clinton Prison Interdepartmental Communication) |
| June 15 | —Filed Plaintiff's Exhibit No. 4 (Prison Commutation Board Conditional Releases 10/68) |
| June 15 | —Filed Plaintiff's Exhibit No. 5 (Prison Commutation Board July 21, 1967) |
| June 15 | —Filed Defendant's Exhibit A (Auburn Prison Disciplinary Action dated March 15, 1962) |

*John Kritsky Docket Entries.*

| DATE 1970 | PROCEEDINGS |
|---|---|
| June 15 | Filed Defendant's Exhibit B (Inmates' Rule Book) |
| June 15 | Filed Defendant's Exhibit C (photostatic copy of letter dated October 10, 1968 to Hon. Paul D. McGinnis, Commissioner of Correction from J. E. LaVallee, Warden |
| June 15 | Filed Memorandum-Decision and Order—Foley, D.J. the Commissioner of Correction is directed to restore the good behavior time credit of 590 days to plaintiff; such restoration will entitle plaintiff to release forthwith to parole supervision under his Conditional release election. If plaintiff is not released forthwith, the attorney for plaintiff shall submit a writ of habeas corpus to effect the release. All exhibits shall be filed with this decision in the Clerk's Office at Utica. Judgment shall enter granting the relief to the plaintiff particularly set forth in the above paragraph. This decision constitutes the judgment. It is So Ordered—James T. Foley, U.S.D.J. |
| July 2 | Filed Notice of Appeal of State of New York |

*John Kritsky Docket Entries.*

(UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT,

Docket No. 35253)

| DATE | PROCEEDINGS |
|---|---|
| 8- 3-70 | Received record (original papers of district court) |
| 8-11-70 | Filed record (original papers of district court) |
| 9-10-70 | Filed order removing original record, appellant |
| 9-16-70 | Filed order extending time to file appellant's brief & appendix to 10-1-70 |
| 9-30-70 | Filed appendix with proof of service |
| 9-30-70 | Filed brief, appellant with proof of service |
| 10-19-70 | Filed motion for assignment of counsel with proof of service |
| 11-16-70 | Filed order granting motion assigning Richard A. Kohn as counsel for appellee |
| 12-16-70 | Filed order adjourning argument of appeal to 1-4-71 |
| 1- 4-71 | Filed brief, appellee |
| 1- 4-71 | Filed supplemental brief, appellee |
| 1- 4-71 | Filed volume of exhibits (4 copies) |
| 1- 4-71 | Argument heard (by: Lumbard ChJ, Moore & Smith, CJJ) |
| 7-19-71 | Filed order granting reconsideration in banc, etc.; the in banc proceedings in the three cases are consolidated; if petitioners desire to file further briefs, they may do so by 8-16-71; if respondents desire to file further briefs, they may do so by 9-13-71; no further oral argument will be heard unless otherwise ordered (Consolidated with 34567 and 35300) (Filed in 34567) |

*John Kritsky Docket Entries.*

| DATE | PROCEEDINGS |
|---|---|
| 10-12-71 | Filed order re in banc—judges of the court and members of the respective panels who have taken senior status will hear oral argument 11-4-71 at 2 P.M. Room 506; if counsel desire to file additional briefs on these subjects these should be served and filed by 11-1-71 (filed in 34567) (& in 35300) |
| 11- 1-71 | Filed supplementary brief, appellee with proof of service |
| 11- 1-71 | Filed brief, appellants (on rehearing) with proof of service (Filed in 34567) |
| 11- 4-71 | Argument heard (by: Friendly, ChJ, Waterman, Moore, Smith, Kaufman, Hays, Feinberg, Mansfield, Mulligan, Oakes, & Timbers, CJJ) (& in 35253 and 35300) |
| 2-10-72 | Filed itemized and verified bill of costs |
| 2-10-72 | Issued Mandate (judgment) |
| 2-18-72 | Filed statement of costs |
| 2-18-72 | Issued statement of costs |
| 6-20-72 | Original record returned to district court |

## Complaint and Petition.

STATE OF NEW YORK
COUNTY OF CLINTON } ss.:

JOHN KRITSKY plaintiff-petitioner (hereinafter referred to as plaintiff), respectfully alleges:

1. This action arises under the Constitution of the United States in particular Art. I Sec. 9, Cl. 2, and the Fifth, Sixth, Eighth and Fourteenth Amendments thereto and under 28 U.S.C. §§ 2241 2254 and 42 U.S.C. § 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1331, 1343(3), 2241, 2254 and 42 U.S.C. § 1983 and under Art. I, Sec. 9, Cl. 2 of the Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments thereto.

2. The matter in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand ($10,000) Dollars.

3. Relief is sought herein for petitioner's release, pursuant to a Writ of Habeas Corpus from unlawful custody in violation of plaintiff's constitutional rights; for a Declaratory Judgment pursuant to 28 U.S.C. §§ 2201 and 2202 and for preliminary and permanent injunction pursuant to 28 U.S.C. § 1651 and 42 U.S.C. § 1983.

4. Plaintiff, a natural-born citizen of the United States, was convicted of first-degree robbery on May 1, 1957, and was sentenced as a second-felony offender to an indeterminate term of from fifteen to eighteen years on June 24, 1957, in the General Sessions Court of New York County. Plaintiff has served approximately 12½ years in prison, without probation or parole, and is presently incarcerated at Clinton State Prison, Dannemora, New York.

5. The individual defendants in this proceeding are sued in their official capacity:

a. Paul D. McGinnis, New York State Commissioner of Correction, whose principal office is located in Albany, New York, is charged with the duty of directing and supervising the activities of the defendant, Department of Correction, which administers the prisons and other correctional institutions and programs of New York State, pursuant to New York Correction Law (hereinafter "Corr. L.") §§ 5, 6-a, 112 *et seq.* The Commissioner of Correction is also empowered to appoint the wardens of the various state prisons, including Clinton State Prison, who serve under his general direction. Corr. L. §§ 234, 803 authorize the Commissioner of Correction to formulate rules governing the allowance or disallowance of reductions in prison terms "for good conduct and for efficient and willing performance of duties assigned to . . . (prisoners) in prison or penitentiary (hereinafter referred to as 'good behavior time credit')."

b. J. Edwin LaVallee, Warden of Clinton State Prison, is the person having direct and immediate custody of the plaintiff. Pursuant to Corr. L. §§ 235, 803, the defendant LaVallee is charged with the duty of acting as chairman of the "Prison Board" of Clinton State Prison, which determines allowance or disallowance of good behavior time credit.

c. Russell G. Oswald, whose principal office is located in Albany, New York, is chairman of the defendant New York State Board of Parole, which is empowered to determine the qualifications of prisoners for release on parole pursuant to Corr. L. § 210 *et seq.* and to supervise prisoners who have been released on parole or under the "statutory" or "conditional release" programs established by Corr. L. §§ 220, 234, 803, Penal L. §§ 70.30, 70.40, and described in greater detail in paragraphs 6 and 7, *infra.*

6. Prior to September 1, 1967, prisoners serving indeterminate sentences in New York State Prisons were eligible to participate in the "Statutory Release" program pursuant to Corr. L. § 230, which provides that a prisoner serving an indeterminate sentence may earn up to five days per month but no more than two months per year "Good Behavior Time Credit" toward the reduction of his maximum term, thereby qualifying the prisoner for mandatory release from prison under supervision of the Board of Parole after serving five-sixths of the maximum term.

7. In 1961, the New York Legislature enacted Corr. L. § 803 and Penal L. § 70.40(b) establishing the "Conditional Release" program, under which a prisoner serving an indeterminate term could earn up to 10 days per month good behavior time credit toward the reduction of his maximum term, thereby qualifying him for mandatory release from prison under the supervision of the Board of Parole after serving two-thirds of his maximum sentence provided such prisoner elected to participate in the conditional release program and waived his rights under the statutory release program, above described.

8. Plaintiff did in fact so elect to participate in the conditional program and waived his rights under the statutory release program.

9. By virtue of the foregoing, plaintiff was therefore fully qualified for and entitled to "Conditional Release" on February 22, 1969. Plaintiff is now approximately 6 months beyond his lawful date of release.

10. The defendants LaVallee and McGinnis, in violation of plaintiff's constitutional rights to due process of law and against cruel and unusual punishment have denied cancelled and disallowed good behavior time credit toward

conditional release, amounting to 939 days, to which plaintiff is entitled, and have thereby arbitrarily and capriciously extended plaintiff's prison term to October 1, 1971.

11. The defendants LaVallee and McGinnis threatened to unlawfully and unjustly imprison and detain the plaintiff in their custody and pursuant to their order in violation of plaintiff's constitutional rights under the Fifth Six and Fourteenth Amendments in that such denial, cancellation and disallowance of good behavior time credit was illegally effected by the defendants LaVallee and McGinnis:

(i) Without affording plaintiff notice of any charges or a fair hearing at which plaintiff would have the assistance of counsel and the opportunity to confront witnesses against him and present evidence on his own behalf; and a specification of the grounds and underlying facts upon which defendants' determination was based;

(ii) Without substantial evidence or even a basis in fact to support the determination; and

(iii) Have established a discriminatory policy against the old law prisoner (those sentenced under the old penal code of New York State), of which plaintiff is ideally representative; have subjected plaintiff to repeated punishment for the same acts; have subjected plaintiff to a double-standard of punishment; have deprived plaintiff of equal protection from repeated punishment, while in contrast, the new law prisoner (those sentenced under the New Penal Code of N.Y.S., effective September 1, 1967) is protected from repeated punishment for the same acts. Such behavior is afar cry from acting in accordance with law, justice, and fairness; and

(iv) Said determination to deny, cancel and disallow good time behavior credit was arbitrary and capricious

and an abuse of discretion and was part of a program of harassment and oppression directed at the plaintiff for having participated in a peaceful and non-violent work strike which ultimately culminated in legislation being passed to grant good time on the maximum of a sentence [Corr. L. § 230(4)] for which plaintiff was sentenced to 18 months lost time. Evidently, said punishment is quite severe, in this case, beyond the mandate of statutory obedience.

12. All available and adequate state remedies have been exhausted.

13. No prior application has been made for the relief requested herein.

WHEREFORE plaintiff prays for the following relief:

1. That a judgment issue declaring the determination of the defendants LaVallee and McGinnis and their agents denying, cancelling, and disallowing 939 days good behavior time credit toward conditional release was void illegal and in violation of the Fifth, Sixth and Fourteenth Amendments for the reasons specified and set forth in Paragraph 13, *supra*.

2. Restraining the defendants LaVallee and McGinnis and their agents from denying, cancelling or disallowing good behavior time credit toward conditional release without adhering to procedural due process;

3. Issuing a Writ of Habeas Corpus requiring the defendant McGinnis to order plaintiff's conditional release from imprisonment forthwith of a corrected computation; and

4. Granting such other and further relief as this Court may deem appropriate.

Dated: August 6, 1969.

By JOHN KRITSKY—#37729
Box "B"
Dannemora, New York, 12929

STATE OF NEW YORK }
COUNTY OF CLINTON } ss.:

JOHN KRITSKY, being duly sworn deposes and says:

That he is the plaintiff-petitioner named in the foregoing petition.

That same is true to his knowledge and experience undergoing such unwarranted treatment, and punishment, as stated, and this petition is submitted in good faith, and to obtain redress of law and protection of the law thereunder.

JOHN KRITSKY
Plaintiff-Petitioner pro se

Sworn to before me this
6 day of August, 1969.
FRANCIS A. RYAN,

FRANCIS A. RYAN,
Notary Public,
Clinton Co., State of New York.
Commission Expires March 30, 1970.

## Answer.

Defendants, by their attorney, Louis J. Lefkowitz, Attorney General of the State of New York, for an answer to the complaint of the plaintiff herein, allege as follows:

### First Defense

The complaint fails to state a claim sufficient to establish the jurisdiction of this Court over the subject matter.

### Second Defense

The complaint fails to state a claim against the defendants upon which relief can be granted.

### Third Defense

That any denial, cancellation or disallowance of good behavior time credit to the plaintiff by the defendants in connection with plaintiff's sentence as a second felony offender in the General Sessions Court of New York County on June 24, 1957 was not in violation of plaintiff's constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution nor was the same in violation of the plaintiff's rights under the New York State Constitution nor in violation of any Federal or State statutes governing plaintiff's incarceration in any prison of the State of New York pursuant to said sentence.

Wherefore, defendants respectfully pray that the complaint herein be dismissed.

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendants-Respondents
The Capitol
Albany, New York 12224

(Verified by J. Edwin LaVallee on October 14, 1969.)

## Memorandum-Decision and Order of October 28, 1969.

JAMES T. FOLEY, D.J.

MEMORANDUM-DECISION AND ORDER

By memorandum-decision and order dated September 5, 1969, the plaintiff-petitioner was authorized to proceed in forma pauperis in order to have served the complaint, for which he had paid the statutory filing fee. The present motion to decide is for bail pending determination of the issue, and was made returnable by me at a regular motion day, October 6, 1969. There is an opposition affidavit to the grant of bail filed in behalf of the respondents.

The motion for bail is denied. The power is probably inherent in this Court, but is rarely exercised. (See U. S. ex rel. Epton v. Nenna, (SDNY), 281 F. Supp. 388). An evidentiary hearing which does not seem to meet with any serious opposition from the State is hereby fixed, to be held in the main courtroom, Federal Post Office Building, Albany, N. Y., on Friday, November 14, 1969, at 10:00 A. M. Attorney Richard A. Kohn, 100 State Street, Albany, N. Y., at my request, has agreed to represent the plaintiff-petitioner, and is now assigned as his counsel. A Writ of Habeas Corpus Ad Testificandum has been prepared and allowed and will issue for production of plaintiff-petitioner at the hearing.

It is So Ordered.

Dated: October 28, 1969

JAMES T. FOLEY,
United States District Judge.

## District Court Opinion and Order (June 12, 1970).

JAMES T. FOLEY, Chief Judge.

The plaintiff filed a handwritten complaint based upo the civil rights statutes and petition for habeas corpus i the same combined form with similar issues as filed i Rodriguez v. McGinnis (N.D.N.Y.—December, 1969) 30 F. Supp. 627, that after trial I ruled upon in favor o Rodriguez. He paid the $15.00 filing fee and thereafter I granted leave to prosecute his action in forma pauperis Attorney Richard A. Kohn, who appeared for Rodrigues agreed to act as counsel for plaintiff, for which assistanc the Court is again grateful inasmuch as there is no provi sion for compensation of any kind or reimbursement for expenses. Attorney Kohn represented the plaintiff at the hearing held and submitted a substantial brief in his behalf on the law and facts after the transcript was available Transcription of the minutes of the hearing understand ably took some time and caused delay in the briefing. Two court reporters in this busy two Judge Court, where we have the flow also of other purely federal and important private and government civil and criminal cases as other District Courts do, place substantial burdens upon them in the coverage of our large geographical area to the same extent as it does upon the Judges deluged with state prisoner applications of every kind. Pressures of other work that I thought should be given priority prevented on my part the speedy disposition we try to give State prisoner applications where immediate liberty may be at stake. However, the filing in this Court of a substantial number of civil rights complaints for every grievance imaginable by New York State prisoners in recent years has slowed considerably the disposition within the desired reasonable time. However, in my judgment, the other numerous and substantial cases filed in this District Court in behalf of important private and governmental interests have the right to be processed, heard and decided also with reason-

ble dispatch. I reaffirm my statements in Rodriguez that it is my firm belief it would best serve the interest of justice and all concerned and be sensible if a little abstention were authorized when proper in the federal courts to allow a fully manned and recognized competent State Court system to hear these civil rights claims that primarily involve State interests, problems and concerns (See Wright v. McMann, 387 F.2d 519, at 528, Chief Judge Lumbard concurring).

A satisfactory hearing in this claim was held and references herein shall be to the transcript of it. In the complaint, the plaintiff requests a judgment declaring the disallowance of 939 days good behavior time toward the conditional release he elected formally for under certain New York statutory provisions was adjudged in such manner to be violative of constitutional rights of due process and imposing cruel and unusual punishment. (Pl.Ex. 1, §§230-a, 803(1), N.Y. Correction law (McKinney's Consol. Laws, c. 43, 1968 ed.); New York Penal Law, 70.30(4) (a); 70.40(1), (b), (McKinney's Consol.Laws, c. 40, 1967 ed.).

The position of the Assistant Attorney General in behalf of the defendants is the same as that taken and offered in Rodriguez, supra. The contentions (1) there is not jurisdiction under 28 U.S.C. §1343(3), as so invoked to entertain the civil rights claim authorized by 42 U.S.C. §1983, (2) that conditional release is in the same category as parole, being a matter of grace to be withheld at will, are answered in my Rodriguez writing in relation thereto and are adhered to by reference herein. (See also the difference between parole and conditional release—Task Force Report on Correction, issued by the President's Commission on Law Enforcement and Administration of Justice, p. 86). In Rodriguez, I pointed out that New York rulings expressly held that discretionary reductions for good behavior time cannot be arbitrarily withheld. (People ex rel. Stark v. Deegan (1968) 56 Misc.2d 567, 289 N.Y.S.2d 285;

People ex rel. Roy v. Murphy (1962) 36 Misc.2d 501, pp. 503-504, 233 N.Y.S.2d 382). Inasmuch as New York seems adamant in arguing need for exhaustion of state remedies and lack of jurisdiction in a problem of this kind concerning loss of good time allegedly disallowed unconstitutionally, appeal is invited again to be expedited that may settle once and for all these questions that by now must be ripe for federal appellate review and rulings. Such appellate guidance will be of great assistance to this District Court in the planning and management of its calendars. (See Sostre v. Rockefeller et al., 312 F.Supp. 863, (S.D.N.Y.-68 Civ. 4058—Motley, J.) decided May 14, 1970).

The challenge of the petitioner who was produced in Albany on a writ of habeas corpus from Clinton Prison, two hundred miles away, was reduced before the hearing after conference with his attorney from 939 days disallowed to 590 days. This good time disallowance was thus narrowed to a single episode, unquestionably a serious one, that occurred in Auburn State Prison during March 1962. Two witnesses testified at the hearing, the plaintiff, who in my judgment was as articulate a witness who could be heard and who gave his version of the serious incident in which he was admittedly involved, and that led to the judgment of the Principal Keeper set forth in Plaintiff Ex. A in this brief fashion: "To Segreg.—1½ years Lost Time." The lost time, or good behavior time credits taken for a year and one-half are computed to be 545 days, and the length of his segregation from March 14 to April 10, 1962 at Auburn and April 10 to July 28, 1962 at Clinton Prison, Dannemora, is the basis for the additional 45 days good time loss in issue. No good time by prison rule is earned while confined in segregation. (Def. Ex. B—Inmate's Rule Book, pp. 4-5). The only other witness, who testified was Francis Ryan, called by the plaintiff, Head Correctional Clerk at Clinton Prison who explained the law and rules and procedures applicable and the internal

administrative methods followed by the so-called Prison Commutation Board to comply with the statutory review provision when good time forfeiture is reviewed and not restored (Tr. 75 et seq., §§ 234, 235, 236, N.Y.Corr. Law; 7 N.Y. C.R.R. (Correction—Codes, Rules & Regulation, §60.4(e). Ryan with a long experience in Prison administration evidenced familiarity with all the procedures and at times as he testified sat when necessary as a member of the Commutation Board and was able to tell the full details of the way it actually operates and arrives at decision. (See particularly Tr. 96-105.)

The Plaintiff Kritsky was convicted in the former Court of General Sessions of New York County of Robbery First Degree on May 1, 1957. He was sentenced to an indeterminate term of 15-18 years. At the time of sentence, he was about 22 years of age and has been now more than 13 years in prison confinement.

The serious incident referred to previously was described by Kritsky in his testimony that stands in every respect uncontradicted in this record by other testimony concerning the circumstances of its happening. It seems that in 1962 the prisoners at Auburn in a protest move that Kritsky said occurred throughout the entire State prison system in an effort to persuade the New York legislature to grant by legislation ten days off the maximum sentence that would enable some prisoners to gain earlier release. (Tr. 28-29). Apparently, this protest later bore fruit and such legislation came into being (See also People ex rel. Clemente v. Warden (1961) 9 N.Y.2d 216, 213 N.Y.S.2d 55, 173 N.E.2d 784). Kritsky characterized the conduct of the prisoners as peaceful and said it consisted only of the prisoners entering and staying in their cells and refusing to come out to go to their work or other type assignments in the daily prison routine. The protest by their action lasted about one and a half days. The prisoners were warned that if they did not come out of their cells by a certain time they would lose one year good time and Kritsky said about

7/8 at Auburn did come out after this warning (Tr. 30). Kritsky came out about an hour later than the deadline, and the next morning went to his work as a clerk in a prison office. However, he testified he noticed many of his friends no longer there, so he went back that afternoon to his cell again contrary to what he was supposed to do. He was taken from the cell five to fifteen minutes later, and was taken to segregation where he was kept for a week to ten days before he came before the Principal Keeper for hearing. Again, I do not intend to minimize the seriousness of this entire affair, no matter how laudable the purposes, because it is evident prison discipline and order could be in great peril if protest movements, so commonplace and at times upsetting to some in these days, were to be given free rein in prison systems where firmness and application of quick and adequate discipline is clearly as essential to safeguard the security of a large prison and circumvent the start or spread of possible riot and rebellion. No court would want to interfere with these delicate judgments.

However, as grave an intrusion as I think all these are, particularly when made by a federal court into administration of State prisons that do not really entail the cruelty or inhumaneness that shocks everyone, I find that the due process of rights of the plaintiff were violated in the type hearing given plaintiff in 1962. The hearing was held a week or ten days after the protest in a room off the segregation area where plaintiff had been confined with only the Principal Keeper, as the disciplinary authority and judge. The plaintiff's testimony is graphic description:

> "A He (Principal Keeper) advised me that I had been charged with advocating insurrection and a revolution and advocating incendiarism in the prison. He said, 'How do you plead?' I said, 'Not guilty.' He said, 'Eighteen months lost time.'
>
> I attempted to speak—

> The Court: Wait a minute. He said, 'How do you plead?'
> The Witness: I said, 'Not guilty.'
> The Court: All right.
> The Witness: I attempted to speak and he interrupted and said, 'That will be all.' And I replied, 'In other words, I am being summarily dismissed.' He said, 'Yes.' "

In my judgment, this hearing, and I accept it as truthfully described by the plaintiff, falls far short of the fundamental fairness expected of due process requirements, no matter the need for summary disposition.

Defendant's Exhibit A, measuring by ruler about 5¼" by 8", is entitled "Disciplinary Action." It contains in most abbreviated form the charges against plaintiff, the substantial judgment rendered against him, and remarks of the disciplinary hearing officer, the Principal Keeper. The remarks without a single reference or elaboration of any kind to person or record concludes "Advocated bloodshed and burning place." There is only a dash in a large space before the word guilty which is difficult to accept as a valid admission of guilt by reason of record regularity in view of the flat contradiction by the plaintiff.

Due process is an elusive concept but there is settled satisfactory guides to discern its absence or presence. What is due process depends on the circumstances and it varies with the subject matter and necessities of the situation. (Moyer v. Peabody (Holmes, J.) 212 U.S. 78, 84, 29 S.Ct. 235, 53 L.Ed. 410). A hearing to accord with due process must be given at a meaningful time and in a meaningful manner. (Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct., 1187, 14 L.Ed.2d 62). Under the concepts of the present day, it has been stated the decision maker should state reasons for the determination, indicate the evidence relied upon, and an impartial decision maker is essential. (Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011,

25 L.Ed.2d 287, 3/23/70). The right to be heard before being condemned to suffer grievous loss of any kind is a principle basic to our society. (Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 95 L.Ed. 817). Applying these principles, I am constrained to rule there was a lack of due process that resulted in grievous loss to plaintiff by reason of continued confinement.

By this ruling, I do agree that in these prison disciplinary procedures there is no need for a full panoply of judicial due process which was the language and recommendation contained in the Task Force Report on Corrections, issued by the President's Commission on Law Enforcement and Administration of Justice, at p. 13. I would think sufficient and fair the four requisites outlined by Judge Wyzanski in Nolan v. Scafati (D.C.Mass.) 306 F.Supp. 1, 3, for proper procedure before prisoner such as plaintiff is subjected to a serious penalty. (See also Landman v. Peyton (4 Cir. 1966) 370 F.2d 135). The ruling herein is also not to be construed as one to the effect that unrestricted and absolute right to free speech should be accorded prison inmates. (See Whitney v. California (1927) 274 U.S. 357, 373, 47 S.Ct. 641, 71 L.Ed. 1095; Roberts v. Pepersack (D.C. Maryland 1966) 256 F.Supp. 415, 428). Prison discipline is essential and certain rights have to be curtailed in order to achieve it. (United States ex rel. Wakeley v. Pennsylvania (D.C.E.D.Pa. 1965) 247 F.Supp. 7).

I also find as in Rodriguez a failure to comply with the statute of New York that directs the prison commutation board to forward its reason in writing to the Commissioner of Correction for disallowance of good behavior time (N.Y. Correction Law, Section 236). There was a letter from the Warden, to the Commissioner, Def.Ex. C, derogatory to the conduct of plaintiff but it was conceded that this letter was not being offered as strict compliance with Section 236, but was sent for another purpose. (Tr. 102). In my judgment, the record in this case shows the importance this

report of reasons might have in relation to the review by Commissioner of the disallowance by the Commutation Board. There is a progress report made by Correction Officer Burke that evaluates the conduct of the plaintiff and his willingness to work attitude in the most praiseworthy terms. (Tr. 107, 108.) Some of the terms are that plaintiff is courteous, cooperative, well behaved with good attitude toward society and authority, who does not need extra supervision and was a very exceptional worker. The appraisal directly contradicts the one contained in the letter of the Warden. Unfortunately, it is established that the Prison Commutation Board ordinarily would not have this progress report of a guard who was in the closest of contact with plaintiff.

My findings of fact are set forth above. My conclusion is that the plaintiff in the imposition of the lost time punishment and segregation was not accorded due process. My judgment declared hereby is that the disallowance of 590 days good behavior time resulting therefrom is void and unlawful as violative of the provisions of the Fourteenth Amendment of the United States Constitution. The Commissioner of Correction, a named defendant, is directed hereby to restore the good behavior time credit to plaintiff; such restoration will entitle plaintiff to release forthwith to parole supervision under his Conditional release election. If plaintiff is not released forthwith, the attorney for plaintiff shall submit a writ of habeas corpus to effect the release. All exhibits shall be filed with this decision in the Clerk's office at Utica.

Judgment shall enter granting the relief to the plaintiff particularly set forth in the above paragraph. This decision constitutes the judgment.

It is so ordered.

## Order to *In Banc* (July 19, 1971).

Petitions for rehearing in the first two mentioned cases were denied by the respective panels, with Judge Waterman dissenting in the *Rodrigues* case and Judge Smith dissenting in the *Katzoff* case. Upon suggestions of the petitioners and at the request of these judges, a poll of the judges in active service was taken and a majority voted for reconsideration in banc.

A majority of the judges in active service has also voted for initial consideration in banc of the third case above-mentioned, which involves a similar issue.

In banc proceedings in the three cases are consolidated. If petitioners desire to file further briefs, they may do so on or before August 16, 1971. If respondents desire to file further briefs, they may do so on or before September 13, 1971. The in banc court will consist of the judges in active service on the date of decision along with members of the respective panels who have taken senior status. Further oral argument will not be heard unless otherwise ordered.

HENRY J. FRIENDLY
Chief Judge

July 19, 1971.

## *In Banc* Opinions and Order (January 25, 1972).

UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

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No. 889—September Term, 1969; Nos. 255 and 336—September Term, 1970; Nos. 354, 355 and 356—September Term, 1971.

(Argued to the *in banc* court November 4, 1971
decided January 25, 1972.)

Docket Nos. 34567, 35300 and 35253

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EUGENE RODRIGUEZ, and the UNITED STATES OF AMERICA *ex rel.* EUGENE RODRIGUEZ,

*Petitioner-Appellee,*

v.

PAUL D. MCGINNIS, Commissioner of Correction; RUSSELL G. OSWALD, Chairman of the Board of Parole; J. EDWIN LAVALLE, Warden and Chairman of the Prison Board of Clinton State Prison; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTION,

*Respondents-Appellants.*

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UNITED STATES *ex rel.* MICHAEL KATZOFF,

*Petitioner-Appellee,*

v.

PAUL D. MCGINNIS, Commissioner of Correction of the State of New York and JOHN T. DEEGAN, Warden of Auburn State Prison, Auburn, New York,

*Respondents-Appellants.*

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*In Banc Opinion and Order (January 25, 1972).*

JOHN KRITSKY, and UNITED STATES OF AMERICA *ex rel.* JOHN KRITSKY,

*Petitioner-Appellee,*

v.

PAUL D. MCGINNIS, Commissioner of Correction; RUSSELL G. OSWALD, Chairman of the Board of Parole; J. EDWIN LAVALLE, Warden of Clinton State Prison, NEW YORK STATE BOARD OF PAROLE and NEW YORK STATE DEPARTMENT OF CORRECTION.

*Respondents-Appellants.*

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Before:

FRIENDLY, *Chief Judge,*
LUMBARD, WATERMAN, MOORE, SMITH,
KAUFMAN, HAYS, FEINBERG, MANSFIELD,
MULLIGAN, OAKES and TIMBERS,

*Circuit Judges.*

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The District Court for the Northern District of New York having, by order dated December 23, 1969, directed the release of petitioner Eugene Rodriguez, on the ground that he was unconstitutionally deprived of good behavior time credit, in an opinion reported at 307 F. Supp. 623, and a panel of this court by decision dated March 16, 1971, slip opinions 4745, September Term 1969, having reversed said order by a divided vote;

The District Court for the Northern District of New York having, by order dated August 18, 1970, directed the release of petitioner Michael Katzoff, on the ground that he was unconstitutionally deprived of good behavior time credit, and this court by decision dated March 29, 1971, 441 F.2d 558, having reversed said order by a divided vote;

*In Banc Opinion and Order (January 25, 1972).*

The District Court for the Northern District of New York having by order dated June 12, 1970, directed the release of petitioner John Kritsky, on the ground that he was unconstitutionally deprived of good behavior time credit, and this court having heard but not decided the State's appeal therefrom;

This court, by order dated July 19, 1971, having directed that the appeals in such cases be reheard *in banc*, the three appeals being consolidated for argument since they presented the same legal issue, before an *in banc* court which would consist of the judges who should be in active service on the date of decisions along with members of the respective panels who had taken senior status, and the court having received further briefs and heard oral argument, it is

Ordered that the said judgments of the District Court for the Northern District of New York be and they hereby are affirmed upon consideration of the merits and upon the authority of *Wilwording* v. *Swenson*, No. 70-5308, decided by the Supreme Court of the United States on December 14, 1971.

/s/ HENRY J. FRIENDLY.
Henry J. Friendly, *Chief Judge*

January 25, 1972.

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FRIENDLY, *Chief Judge*, with whom MULLIGAN, *Circuit Judge*, joins concurring:

Although I had previously voted for reversal in these cases, it seemed to me that once *Wilwording* v. *Swenson* was decided by the Supreme Court on December 14, 1971, 40 U.S.L.W. 3277, the proper course for the *in banc* court was to affirm the orders of the district court without writing opinions, and to leave it to the State of New York to assert possible distinctions by petitions for certiorari.

Now that several of my brothers have chosen to dissent in an opinion, I feel obliged to explain my own position.

I agree with Judge Lumbard that petitions of state prisoners complaining of the time or conditions of their confinement have the same potentialities for exacerbating federal-state relations as petitions attacking the validity of their confinement—perhaps even more. That federal concern on this score is not limited to challenges to the validity of convictions is evidenced by cases such as *Ex parte Royall*, 117 U.S. 241, 251 (1886), from which the exhaustion requirement sprang, and *Dye* v. *Johnson*, 338 U.S. 864 (1949), *reversing per curiam*, 175 F.2d 250 (3 Cir. 1949). On the other hand, I cannot accept the conclusion that if such petitions are properly viewed as invoking 42 U.S.C. § 1983, a federal court can require exhaustion of state judicial remedies, if these are available. This is not simply because of the Supreme Court pronouncements which except for the summary dispositions in *Houghton* v. *Shafer*, 392 U.S. 639 (1968) and in *Wilwording* v. *Swenson*, were not in state prisoner cases, but because abstention would mean abdication in any case where the state afforded a fair hearing, whether the proper constitutional standards were applied or not. See *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1963); *Lackawanna Police Benevolent Ass'n* v. *Balen*, 446 F.2d 52 (2 Cir. 1971), and cases there cited.

The right answer, it seems to me, is that, under the broad scope the Supreme Court has given to the "Great Writ" as enacted by the Act of 1867, 14 Stat. 385, all state prisoner petitions complaining of the length or manner of custody, however phrased, are in fact petitions for habeas corpus "in behalf of a person in custody pursuant to the judgment of a state court . . . on the ground that he is in custody in violation of the Constitution or laws of the United States." *Jones* v. *Cunningham*, 371 U.S. 236, 243

(1963); *Walker* v. *Wainwright*, 390 U.S. 335 (1968); *Peyton* v. *Rowe*, 391 U.S. 54 (1968); *Johnson* v. *Avery*, 393 U.S. 483 (1969). If they are, 28 U.S.C. § 2254(b) forbids a federal court from proceeding in the first instance "unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner"—an exception sufficiently broad to enable a federal court to look at what the state courts actually do. Because of the inapplicability of *res judicata* in *habeas corpus*, recognition that such petitions are for that remedy also means that an aggrieved prisoner who has not received satisfaction at the hands of a state court can return to the federal court for a "final federal say" concerning the appropriate legal standard, although the federal court will be bound by proper state factual findings. I recognize that a number of cases, including *Houghton* v. *Shafer*, *supra*, and *Jackson* v. *Bishop*, 404 F.2d 571 (8 Cir. 1968), cited by the Court in *Wilwording*, have assumed that state prisoner complaints over the conditions of custody come under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) rather than under 28 U.S.C. § 2254. But the issue was not there raised, and the problem of such prisoner applications had not yet reached its present dimensions.

If this is the correct analysis, I do not understand how a state prisoner who is entitled to relief by *habeas corpus* under 28 U.S.C. § 2254 can opt out of that section, with its attendant requirement of exhaustion of state remedies when these are available, simply by styling his petition as one under the Civil Rights Act. But *Wilwording* seems to indicate that he can. For that reason I am constrained to concur in affirming the orders of the district court.

WATERMAN, *Circuit Judge* (concurring):

I concur in the affirmance of the judgments below and in the opinions of my brothers Smith, Kaufman, Feinberg and Oakes. And see my statement filed in *Rodrigues* v. *McGinnis et al.* (2 Cir. March 16, 1971).

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SMITH, *Circuit Judge* (concurring):

I concur in the affirmance of the judgments below and in the opinions of my brothers Kaufman, Feinberg and Oakes. As indicated in my dissent to the panel opinion in *Katzoff*, 441 F.2d 558, 560, I would not hold that either abstention in deference to the state courts or exhaustion under the requirements of 28 U.S.C. § 2254(b) in *habeas corpus* actions may bar a prisoner from his choice of a federal forum in a civil rights action. I had thought that this was reasonably plain from *McNeese* v. *Board of Education*, 373 U.S. 668, 672 (1963), *Damico* v. *California*, 389 U.S. 416 (1967), *Houghton* v. *Shafer*, 392 U.S. 639 (1968), and our own course in *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971). *Wilwording* v. *Swenson*, —— U.S. ——, Dec. 14, 1971, bolsters that view.

Moreover, I question the desirability of even attempting to lighten our burden by stifling or delaying prisoners' complaints of unconstitutional abuse. It may be an onerous burden, especially in the districts where large state prisons are located. Many petitions are poorly prepared confusing and mendacious. They do take the time of busy courts. But these cases now before us demonstrate that among them are some of substance, a circumstance which makes the effort worthwhile. It would be far better to provide more assistance in the districts which contain Attica and the other large institutions giving rise to these

issues than to deny redress within the federal court system for deprivation of civil rights.

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KAUFMAN, *Circuit Judge* (concurring):

The question which was presented to this court *in banc* is whether a state prisoner must exhaust state judicial remedies before he can bring an action for equitable relief under 42 U.S.C. § 1983, where his complaint charges that state prison officials have deprived him of fundamental personal rights. My unwavering answer to that question was that exhaustion is not required. Moreover, I agreed with Chief Judge Friendly that it was appropriate to dispose of these cases without opinions because of the Supreme Court's clear and unconditional holding in *Wilwording* v. *Swenson*, 40 U.S.L.W. 3277 (Dec. 14, 1971). Since my brothers have chosen to file opinions explaining their positions, I believe it is necessary for me to state the reasons for the views I held.

In *Wilwording* the Supreme Court instructed that: "State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs." This pronouncement was based on its decisions beginning with *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961), where the Supreme Court held that the federal remedy provided by § 1983 "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *See also McNeese* v. *Board of Education*, 373 U.S. 668 (1963); *Damico* v. *California*, 389 U.S. 416 (1967); *Houghton* v. *Shafer*, 392 U.S. 639 (1968). I note also that *Wilwording* emphasized that the result in no way depended upon the inadequacy of state remedies. Quoting from *Houghton* v. *Shafer*, *id.* at 640, it added: "in any event, resort to these remedies is unnecessary.'"

I believe, however, that I should state candidly that I did not construe *Wilwording* as a ground breaking decision. The opinion instead indicates the Court's clear deference to the doctrine of *stare decisis*. *See Monroe* v. *Pape*, 365 U.S. at 192 (Harlan, *J.*, concurring). And it was our adherence to the principles gleaned from the earlier Supreme Court decisions that led us to conclude in our recent *in banc* decision in *Sostre* v. *McGinnis*, 442 F.2d 178, 182 2d Cir. 1971), that exhaustion of state legal or equitable remedies is not a prerequisite for a state prisoner to maintain a § 1983 action.

I do not intend to argue with statistics indicating that prisoner petitions are on the rise; nor shall I pretend that this condition is pleasing to Judges. But I cannot believe that federal jurisdiction in cases involving prisoner rights is any more offensive to the state than federal jurisdiction in the areas of police procedures for search, arrest and detention, *Monroe* v. *Pape*, *supra*, or education, *McNeese* v. *Board of Education*, *supra*, or welfare, *Damico* v. *California*, *supra*, or public housing, *Holmes* v. *New York City Housing Authority*, 398 F.2d 262 (2d Cir. 1968). I can think of no reason why the question of prison administration should be classified as one of greater or more peculiar state concern than the instances to which I have just referred. In any event, neither of the grounds articulated is a tolerable basis for declining jurisdiction where a prisoner specifically alleges facts indicating a callous disregard of his basic human and constitutional rights, *see Haines* v. *Kerner*, 40 U.S.L.W. 4156 (U.S., Jan. 13, 1972), or for reworking accepted principles of federal jurisdiction in one sweep of the judicial pen.[1]

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[1] I fully agree with my brother Friendly, for the reasons stated in his opinion, that abstention would be wholly inappropriate here.

*In Banc Opinion and Order (January 25, 1972).*

The Supreme Court's decision in *Wilwording* will not lead to the subversion or circumvention of the *habeas corpus* exhaustion requirement, codified in 28 U.S.C. § 2254(b), which is concerned with prisoner challenges to the validity of state court convictions or sentences. *See Sostre* v. *McGinnis*, 442 F.2d at 182. *See also Fay* v. *Noia*, 372 U.S. 391, 419-20 (1963); Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 172-73 (1948). Collateral attack on a final state court adjudication is *toto caelo* from an untried constitutional claim unrelated to a prior proceeding. Under these circumstances, I see no basis for radically expanding the impact of § 2254(b) or, to put it another way, for concluding that Congress intended by that section to carve out an exception to § 1983 for state prisoners challenging an invasion of their constitutional rights during confinement and stating a valid claim for equitable relief. Indeed, the *sua sponte* construction by the Supreme Court of Wilwording's petition as a complaint under § 1983 clearly articulates that state prisoners alleging deprivation of constitutional rights by prison officials are not forced to mold their claim for relief in the form of a petition for a writ of *habeas corpus*. I find it difficult to believe that the Court, specifically confronted with the alternative modes of pleading, overlooked or did not consider fully the interaction of 28 U.S.C. § 2254(b) and 42 U.S.C. § 1983.[2]

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FEINBERG, *Circuit Judge* (concurring):

I agree with Judges Kaufman and Smith that under the authorities there is simply no basis for requiring these state prisoners to exhaust state judicial remedies as a condition to bringing an action for equitable relief under 42 U.S.C. § 1983. And I further agree with them and with

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[2] I agree with the views expressed by my brothers in their separate concurrences with this opinion.

Chief Judge Friendly that application of the abstention doctrine is not appropriate.

Were those my complete views on these cases, I would resist the temptation to add yet another opinion and would simply concur since by brothers have admirably and succinctly covered those issues. However, there is a further point—perhaps implicit in their opinions—that I believe should be made. If the already over-burdened federal courts are being overwhelmed by frivolous prisoner petitions, it surely is desirable to find some way of coping with that problem in a manner that is nonetheless fair and just to prisoners, whose claims of mistreatment have too often been ignored in the past. But the correct way to reach that result is not for us to indulge in judicial legislation but for Congress to enact an appropriate statute, which could take into account the conflicting policy considerations and could include compromises, limitations and safeguards that we as a court cannot legislate.

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MANSFIELD, *Circuit Judge* (concurring):

I concur in Judge Friendly's opinion. I would add that prior to *Wilwording* v. *Swenson*, 40 U.S.L.W. 3277 (U.S. Dec. 14, 1971) (*per curiam*), my view was that even though there might be cases where a state prisoner's complaint, purportedly brought pursuant to § 1983, could not be treated as a petition for *habeas corpus*, a federal court, upon its finding that the prisoner was seeking equitable relief and was afforded an adequate state court remedy (as here), had the discretionary power as a court of equity to defer action pending the prisoner's application to the state court for relief. See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944); *Alabama* v. *United States*, 304 F.2d 583, 590 (5th Cir), *aff'd. per curiam*, 371 U.S. 37 (1962);

*Pugach* v. *Dollinger*, 277 F.2d 739, 742 (2d Cir. *en banc* 1960), *aff'd.*, 365 U.S. 458 (1961). Upon the prisoner's showing that the state would not offer a reasonably prompt and fair hearing, on the other hand, the federal court would be required to proceed.

The competence of New York state courts to apply federal constitutional principles is not disputed. In most instances their facilities are closer to the state prison in which the prisoner-plaintiff is located (and where regular state court sessions are held) than is the nearest federal court. Furthermore the state court is in a position to insure greater cooperation on the part of essential state personnel (*e.g.*, local and state police, clerks, sheriffs, court reporters and officers of state and county departments) than is the federal court. For example, unless *Wilwording* is limited, suits for injunctive relief by prisoners of one of New York's largest institutions, Clinton Prison, Dannemora, Clinton County, must be heard by the United States District Court for the Northern District of New York, which is located in Albany, 180 miles away. The single federal judge, with only two holding cells and two deputy marshals at his command, will face the necessity of bringing prisoner-plaintiffs and other prisoner-witnesses on a 360-mile round trip in federal custody. By way of contrast, the New York Supreme Court for Clinton County, with no appreciable calendar problem, is equipped to hold court in a nearby county courthouse or in the prison itself.

The extent to which state prisoners' *habeas corpus* petitions have been dressed up in a § 1983 suit of clothes, often merely with a view to the prisoner's availing himself of the change of scenery offered by federal facilities, is attested to by statistics compiled by the Administrative Office of the United States Courts. The 1971 Annual Report of its Director reveals (Table 14, II-48) that from 1968 to 1971 state prisoners' *habeas corpus* petitions in the United States district courts increased 30%, whereas civil rights

suits increased 170%, and that from 1970 to 1971 such *habeas corpus* petitions declined 7.6%, while such civil rights petitions increased 43.6%.

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OAKES, *Circuit Judge* (concurring):

I concur in the affirmance of the judgments below and in the opinions of Judges Smith and Kaufman, agreeing as I do with the original reasoning of Judge Waterman in his dissent in *Rodriguez* v. *McGinnis*, Docket No. 34567 (2d Cir., Mar. 16, 1971), and Judge Smith in his dissent in *Katzoff* v. *McGinnis*, 441 F.2d 558, 560 (2d Cir. 1971). It is not my impression that the federal courts are being overwhelmed with frivolous prisoners' petitions—indeed, many have been highly meritorious. But I agree with Judge Feinberg that if the courts were so burdened, judicial legislation is not the appropriate method of meeting the problem.

To the extent that the dissenting opinion of Judge Lumbard and the concurring opinions of Chief Judge Friendly and Judge Mansfield make arguments directed to the Congress that warrant further reply, that reply, it seems to me, may more appropriately be made in some place other than a judicial opinion. To the extent that those same opinions imply a request to the Supreme Court to reconsider and overrule its own line of cases sustaining jurisdiction, the most recent of which may be *Haines* v. *Kerner*, 40 U.S.L.W. 4156 (U.S., Jan. 13, 1972). I would simply register my vehement disagreement.

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TIMBERS, *Circuit Judge*, concurs in the opinions of Judges Smith, Kaufman and Feinberg.

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*In Banc Opinion and Order (January 25, 1972).*

LUMBARD, *Circuit Judge* (dissenting), with whom MOORE and HAYS, *Circuit Judges*, concur:

I dissent.

Three petitioners seek federal court orders which would direct state prison authorities to take action to correct allegedly unconstitutional treatment.

Michael Katzoff, formerly an inmate of Green Haven Correctional Facility serving a sentence of one to three years for possession of a dangerous weapon, complains that the state acted unconstitutionally in depriving him of good behavior time as punishment for recording offensive remarks in his dairy.

Eugene Rodriguez, formerly an inmate of the Ossining Correctional Facility serving a term of one and one-half to four years for the crimes of perjury and attempted larceny, complains that the state unconstitutionally cancelled good time for either possession of contraband or refusal to disclose its source.

John Kritsky, presently an inmate of Clinton Correctional Facility serving a sentence of 15 to 18 years for the crime of armed robbery, complains of unconstitutional deprivation of good time because of his participation in an inmate strike at Auburn Correctional Facility.

All these actions were brought under 42 U.S.C. § 1983, and in each case the district court granted relief to the petitioner. I would reverse the orders of the district courts and remand with directions to stay further proceedings pending a hearing of the claims in the state court.

Prior to *Wilwording* v. *Swenson*, decided December 14, 1971, 40 U.S.L.W. 3277, I had hoped that these three cases could be resolved, consistent with Supreme Court authority, by a requirement of exhaustion of state remedies as a condition precedent to a cause of action in the federal courts under the Civil Rights Act by a state prisoner seek-

ing equitable relief from allegedly unconstitutional prison conditions or sanctions. *Wilwording* suggests the contrary, but it dealt with an inmate in a Missouri prison and Missouri apparently makes no provision for hearing such cases in its courts.[1] I still think there is room to hold that a District Court in New York—which does provide an adequate remedy in its courts for the redress of legitimate prisoner complaints[2]—should refrain from hearing such a case until the state court has acted thereon, so long as on-going physical brutality is not involved, as it was in *Inmates of Attica* v. *Rockefeller*, decided by this court December 1, 1971, slip op. p. 739.

I am not unmindful that what the Court has said *per curiam* in *Wilwording* follows much that was said along the same lines in *Monroe* v. *Pape*, 365 U.S. 167 (1961), *McNeese* v. *Board of Education*, 373 U.S. 668 (1963), *Damico* v. *California*, 389 U.S. 416 (1967), and *Houghton* v. *Shafer*, 392 U.S. 639 (1968). Only in *Houghton*, however, was the petitioner serving a sentence in a state prison, and it does not appear from the record what, if any, remedies were available to Houghton in the Pennsylvania state court. In any event, the Court did not pass on the considerations which seem to me to compel the conclusion that the federal courts should not hear these cases in the first instance where the state courts are ready, willing and able to give relief.

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[1] *See Wilwording* v. *Swenson*, 40 U.S.L.W. 3277 (Dec. 14, 1971).

[2] *See* Civil Rights Law § 79-c, McKinney's Consol. Laws c. 6, which was added in response to this court's decision in *Wright* v. *McMann*, 387 F.2d 519 (1967). This amendment, "remedial in nature, designed to correct an imperfection in the prior law or to provide a remedy for a wrong if none previously existed, is to be liberally construed so as to spread its beneficial results as widely as possible. . . ." *Marcelin* v. *Scott*, 304 N.Y.S. 2d 299, 300-301 App. Div. 1969).

The resolution of differences between inmates and jailers in state prisons is peculiarly a matter of state interest and concern. These matters can better be determined by the state court which is nearby and available for immediate resolution of such disputes. For some years justices of the Supreme Court of the State of New York, the highest trial court of general jurisdiction, have held court in courtrooms within the confines of the prisons. Thus the petitioning prisoner and any necessary witnesses can be heard with a minimum of risk and expense. By contrast, a hearing in the federal courts requires that prisoners must be moved considerable distances under circumstances presenting a danger of escape and injury to members of the public, to say nothing of substantial expense to the state.

Recent unrest and dissatisfaction in New York state prisons reached a tragic climax at Attica Correctional Facility where a four-day inmate uprising took a death toll of 11 hostages and 32 inmates. Allowing a state prisoner the choice of being heard in a federal court would seem an obvious means of exacerbating relations between state prisoners and their jailers. Obviously the holding of a hearing at a distant federal court is a far greater interruption of prison life and routine than a hearing inside a state prison by a state judge. *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971) (*en banc*), is a good example of what may frequently be involved in a federal court hearing. That case was tried before Judge Motley in the Southern District of New York during seven days of trial extending from Wednesday, October 29, 1969 to Friday, November 7, 1969. In addition to Sostre, who was brought from Walkill Correctional Facility, Walkill, New York, to testify, two other state prisoners were transported to the hearing from Green Haven Correctional Facility, Stormville, New York. The warden, the food service manager, a doctor,

and eleven guards from Green Haven testified. Five guards from Attica Correctional Facility, Attica, New York, testified, as did one from Clinton Correctional Facility, Dannemora, New York.

If the federal courts must hear these suits and resolve factual issues, it is a clear invitation to state prisoners to frame complaints of alleged mistreatment so that they will, at the least, be afforded some vacation from the tedium of prison life.

It could hardly have been the intention of the Congress in enacting § 1983 that it would be the means whereby state prisoners would place state authorities on trial for the manner in which they were cared for and disciplined in state prisons. But there can be no doubt that it is becoming the fashion for state prisoners to bring these suits. The totals for state prisoner civil rights suits commenced in the federal courts of the Second Circuit for the past six fiscal years[1] tell the story—

| | |
|---|---|
| 1966 | 21 |
| 1967 | 62 |
| 1968 | 72 |
| 1969 | 138 |
| 1970 | 277 |
| 1971 | 585 |

All but 38 of the 585 cases filed in 1971 were filed in the four districts of New York. While these totals for state prisoner civil rights suits are still less than those for state prisoner *habeas corpus* petitions in the Second Cir-

[1] These figures are a breakdown of the national totals reported in Table 14 in the 1971 Criminal Report of the Director of the Administrative Office of the United States Courts, prepared by the Division of Information Systems of the Administrative Office.

cuit, which have risen from 571 to 813 in those same years, it should be borne in mind that a very high percentage of the *habeas corpus* petitions can be, and are, disposed of on the face of the petition or after submission of a paper record. By contrast, a very large percentage of Civil Rights Act cases can be disposed of only after a hearing at which the petitioner and others will be produced as witnesses. In the *habeas corpus* cases a record has already been made in the state court, whereas civil rights cases always raise issues which have recently arisen and are wholly undetermined.

It is now quite clear that state prisoners are turning more and more to the Civil Rights Act to redress their grievances and for therapeutic relief, rather than to *habeas corpus*. They not only hope to get an earlier hearing but they also expect a vacation from prison confinement. Unless the district courts can, in the exercise of discretion, stay their hands pending determination of suit in those state courts which will hear the cases, the federal courts will find themselves in the business of running and regulating state prisons.

If the course I propose is followed, certainly it would still be open to the state prisoner to ask the federal court to examine his complaint *de novo*, upon a showing that the state court hearing had not been a full and fair one. *Cf. Townsend* v. *Sain*, 372 U.S. 293 (1963), and 28 U.S.C. §2254(d).

For the above reasons, I would direct the district courts in the three cases before us to stay action until the state court has passed upon the matters complained of by these state prisoners.

# PETITION FOR A WRIT OF CERTIORARI

FILED
APR 24 1972
MICHAEL RODAK, JR., CLERK

# 71-1369

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

RUSSELL G. OSWALD, Commissioner of Correctional Services; PAUL J. REGAN, Chairman of the Board of Parole; J. EDWIN LA VALLEE, Superintendent of Clinton Correctional Facility; JOHN T. DEEGAN, Superintendent of Auburn Correctional Facility; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

*Petitioners,*

*against*

EUGENE RODRIGUEZ, MICHAEL KATZOFF and JOHN KRITSKY,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1971

No. .....

RUSSELL G. OSWALD, Commissioner of Correctional Services; PAUL J. REGAN, Chairman of the Board of Parole; J. EDWIN LA VALLEE, Superintendent of Clinton Correctional Facility; JOHN T. DEEGAN, Superintendent of Auburn Correctional Facility; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

*Petitioners,*

*against*

EUGENE RODRIGUEZ, MICHAEL KATZOFF and JOHN KRITSKY,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit in the cases of *Eugene Rodriguez and United States ex rel. Eugene Rodriguez* v. *Oswald, et al.*, *United States ex rel. Michael Katzoff* v. *Oswald, et al.*, and *John Kritsky and United States of America ex rel. John Kritsky* v. *Oswald, et al.* These cases were heard by the Court sitting *in banc* and were decided on January 25, 1972.

## Opinions Below

The *in banc* decision of the Court of Appeals has not been officially reported to date. A copy is filed with this petition as Appendix "A". The decision of the panel which initially decided the *Rodrigues* case is reported at 451 F. 2d 730 (2d Cir. 1971). It is filed with this petition as Appendix "B". The District Court opinion in *Rodrigues* is reported at 307 F. Supp. 627 (N.D.N.Y. 1969) and is filed herewith as Appendix "C".

The opinion of the Second Circuit panel which initially decided the *Katsoff* case is reported at 441 F. 2d 558 (2d Cir. 1971) and is filed herewith as Appendix "D". The District Court opinion in *Katsoff* has not been officially reported. A copy is filed with this petition as Appendix "E".

No decision was rendered by the panel which heard the appeal in the *Kritsky* case. The opinion of the District Court is reported at 313 F. Supp. 1247 (N.D.N.Y. 1970) and is filed herewith as Appendix "F".

## Jurisdiction

The judgment of the Court of Appeals was entered on January 25, 1972.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## Question Presented

Should State prisoners have the option of challenging the conditions of their confinement by means of the Civil Rights Act when there exists an appropriate remedy by way of habeas corpus?

## Statutes

28 U.S.C. § 2241:

"Power to grant writ:

• • •

(c) The writ of habeas corpus shall not extend to a prisoner unless—

• • •

(3) He is in custody in violation of the constitution or laws or treaties of the United States . . ."

28 U.S.C. § 2243:

"Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

28 U.S.C. § 2254:

"State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

* * *

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to

support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.
(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

42 U.S.C. § 1983:

"Civil Action For Deprivation of Rights

Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

New York Correction Law § 236:

"In all cases . . . where the [prison commutation] board shall withhold the allowance of the whole or any part of reduction of sentence for good conduct and for efficient and willing performance of duties assigned, they shall forward with their report to the

commissioner of correction their reasons in writing for such disallowance. The action of the board in granting or withholding reductions shall be deemed a judicial function and shall not be reviewable if done according to law."

## Statement

Each of the respondents herein was confined in a correctional facility of the State of New York at the time he commenced his *pro se* action in the federal courts. Each filed a combined civil rights complaint and petition for a writ of habeas corpus seeking his release from prison without previously seeking relief in the State Courts. Each asserted that he had been unconstitutionally deprived of his conditional release from prison by the action of the defendants in disallowing him a certain number of good conduct time credits, which action allegedly represented cruel and inhuman punishment. None of the respondents challenged the validity of his conviction or the sentence imposed.

A hearing was held in each case at which the respondents were represented by counsel. All three respondents received a favorable decision on the merits, resulting in the restoration of the disputed credits and immediate release from physical confinement. According to the records of the New York State Department of Correctional Services, the sentences of respondents Rodrigues and Katzoff have run. The maximum expiration date of respondent Kritsky is February 22, 1975.

*Rodrigues*

The underlying claim made by respondent Rodrigues in the District Court was that the determination disallowing the good conduct time in question was made without adequate notice and hearing and therefore violated his right to due process. At the District Court hearing he acknowl-

edged that he had been charged with the possession of certain contraband letters and photographs which he admitted having received but asserted that he was not punished for this but because he refused to tell prison authorities how he had received the contraband correspondence.

In granting relief the District Court preliminarily held that the action brought by respondent was an action under the Civil Rights Act and that the habeas corpus aspect was "merely a proper adjunct to insure full relief" in the event the respondent sustained his underlying claim. Therefore, respondent was not required to exhaust his state court remedies (34a).

The District Court accepted respondent's version of the summary procedures by which the determination was reached and found that the questioning by prison officials was solely in regard to how he got the uncensored materials into Sing Sing (39-40a). However, the Court made no specific finding that the assessment of time was a consequence of the refusal to inform. Although the Court expressed concern with the summary procedures employed, the decision specifically turned on the failure of the Prison Commutation Board to comply with the requirement of § 236 of the New York Correctional Law that it advise the Commissioner of Correction in writing of its reasons for upholding the disallowance of good behavior time. He deemed this omission "substantial" and held that it deprived respondent of both due process and equal protection of the law (41a).

On appeal the Second Circuit reversed the decision by a vote of 2 to 1. The majority rejected the District Court's "view that questions of constitutional significance are involved" (21a) concluding that (a) Correction Law § 236 is not constitutionally required and (b) respondent was not punished for the refusal to inform and, moreover, even if he had been, this would not have been unconstitutional (22a). The Court held that, in any event, the decision was

reversible because respondent Rodriguez had failed to exhaust his state court remedies as required by 28 U.S.C. § 2254(b) and (c).

Judge Waterman, dissenting, concluded that the record below demonstrated that the punishment was based on the refusal to inform, that this violated Rodriguez' constitutional rights and that while the violation of the Correction Law, standing alone, was not unconstitutional, it became so in the context of all that had occurred (26-27a).

*Katzoff*

Respondent Katzoff lost 50 days credit as a result of making derogatory comments about prison officials in his diary. He challenged the actions of prison officials as (1) having been taken without meeting the requirements of due process, (2) constituting cruel and inhuman punishment and (3) violating his rights under the First Amendment.

The District Court found that no rule or regulation barred the keeping of a diary; that the institution was aware that respondent Katzoff was keeping a diary and that there was no evidence that the contents of the diary were in any way made public to other inmates (51-52a).

The Court found as a matter of law that the petition was in the nature of a civil rights action and that the issuance of a writ of habeas corpus was only incidental as a means of enforcing the judgment (54a). While the procedure followed did not violate due process, punishment for acts not amounting to a violation of any institution rule did amount to such a violation. The Court further found that assuming such a regulation existed, the punishment of respondent for his unpublished comments by placing him in segregation with the accompanying loss of good time credit violated his rights under the First and Fourteenth Amendments (55a).

The Court directed the restoration of the time in issue and ordered respondent's immediate release.

A panel of the Second Circuit reversed the District Court by a vote of 2 to 1 without considering the merits on the ground that respondent Katzoff had failed to exhaust his remedies as required by 28 U.S.C. § 2254(b). The Court found that respondent was seeking release from custody and therefore, in essence, seeking habeas corpus relief.

> "There is no basis for limiting the concept of habeas corpus to attacks on custody because of defects in the original conviction as distinguished from a failure to allow release according to law. '[R]elease from a penal custody is not an available remedy under the Civil Rights Act.' " (46a)

The Court rejected an argument that state remedies were inadequate because of the proximity of the release date as assuming

> "without justification that state courts will be less responsive to a constitutional claim than the federal courts. There is no authority for the proposition that the proximity of release relieves a prisoner of the exhaustion requirements of Section 2254(b)." (47a)

Judge Smith dissented stating that this was not habeas corpus since the conviction and sentence were not being challenged. He cited the Circuit Court's opinion in *Sostre v. McGinnis*, 442 F. 2d 178 (2d Cir. 1971) (*in banc*), cert. denied *McGinnis* v. *Sostre*, —— U.S. ——, 40 U.S.L.W. 3428 (March 7, 1972) as allowing a civil rights action to seek restoration of good time, at least in a case of First Amendment rights and concluded that the fact that the restoration of credits resulted in release should not deprive an inmate of a federal forum under the Civil Rights Act.

*Kritsky*

The forfeiture of time in respondent Kritsky's case followed an institution-wide demonstration by the inmates

of Auburn Correctional Facility in 1962. Respondent Kritsky claimed that he was charged with being a leader in the demonstration and that, in summary proceedings at which he pleaded not guilty, he was assessed 18 months good time credits. At the hearing in the District Court he acknowledged that he had participated in the demonstration and that if he had come out of his cell the first day and stayed out he would not have lost any time. However, the following day, instead of going to his job he voluntarily returned to his cell and stayed there in further protest.

After noting both the serious nature of the incident leading to the time disallowance and respondent Kritsky's acknowledgment that he was involved in it, the District Court held that the disciplinary hearing given him violated his right to due process (72a). The Court also determined that the Prison Commutation Board had not filed written reasons with the Commissioner for disallowing the time as required by § 236 of the New York Correction Law. Accordingly, the Court directed that the time credits in issue be restored and ordered respondent's immediate release.

An appeal was argued before a panel of the Second Circuit but no decision had been reached as of the time that the three cases herein were ordered to be heard *in banc*.

**The *In Banc* Opinions**

Petitions for rehearing were denied by the respective panels which heard *Rodrigues* and *Katzoff*, on July 19, 1971 with Judge Waterman dissenting in *Rodrigues* and Judge Smith dissenting in *Katzoff*. At the request of the petitioners and of these judges a majority of the judges in active service voted for reconsideration in these cases *in banc* and, further, for initial consideration *in banc* of the *Kritsky* case, all three cases to be consolidated. On October 12, 1971 the matter was set down for argument

and counsel were specifically advised "to be prepared to discuss the need for the petitioners to exhaust state remedies and the possibility of abstention."

On January 25, 1972, the Court issued an order affirming, 9 to 3, the judgments of the District Court in all three cases "upon consideration of the merits and upon the authority of *Wilwording* v. *Swenson*," 404 U.S. 249 (1971). Eight judges wrote separate opinions.

Chief Judge Friendly had previously voted for reversal but felt bound to affirm the orders of lower court after this court decision in *Wilwording*.

He expressed concern for the effect on federal-state relations caused by petitions of state prisoners complaining of the "time or conditions of their confinement" and pointed out that the concern for these relations "is not limited to attacks on the validity of the convictions". However, he concluded that if these petitions are held to be in the nature of civil rights actions, a federal court cannot require exhaustion of state remedies because of the decisions of this Court, including *Wilwording*, and because, in view of the *res judicata* effect, "abstention would mean abdication in any case where the state afforded a fair hearing" (4a).

Judge Friendly suggested instead that the

> "right answer . . . is that, under the broad scope the Supreme Court has given to the 'Great Writ' as enacted by the Act of 1867, 14 Stat. 385, all state prisoner petitions complaining of the length or manner of custody, however phrased, are in fact petitions for habeas corpus . . ."

to which the exhaustion requirement of § 2254(b) is applicable (4-5a). As such they would not be subject to *res judicata*.

Judge Friendly acknowledged that several cases, including *Houghton* v. *Shafer*, 392 U.S. 639 (1968) and *Jackson* v. *Bishop*, 404 F. 2d 571 (8th Cir. 1968), cited in *Wilwording*,

> "have assumed that state prisoner complaints over the conditions of custody come under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) rather than under 28 U.S.C. § 2254. But the issue was not there raised, and the problem of such prisoner applications had not yet reached its present dimensions." (5a)

This analysis, if correct would seem to preclude an inmate from avoiding the exhaustion requirement simply by denominating the petition as one under the Civil Rights Act. "But *Wilwording* seems to indicate that he can" and, therefore, Judge Friendly felt constrained to affirm (5a).

Judge Waterman concurred in the affirmance and referred to his dissenting opinion in *Rodrigues* v. *McGinnis*, 451 F. 2d 730 (2d Cir. 1971).

Judge Smith, concurring, concluded that neither the doctrine of abstention nor the habeas corpus exhaustion requirement could bar a state prisoner from choosing a federal forum under the Civil Rights Act. In addition, he questioned whether the federal courts should attempt to avoid or delay hearing state prisoners' complaints of unconstitutional abuse since although many petitions "are poorly prepared, confusing and mendacious" and "do take the time of busy courts", the instant cases demonstrate that there are cases of substance which make the "effort worthwhile" (6a).

Judge Kaufman viewed the question for decision solely in terms of whether exhaustion of judicial remedies was required before a state prisoner could seek relief under the Civil Rights Act and concluded that it was not, especially after *Wilwording* (7a). He did not deal with the question of whether the claims before the Court were properly

brought under the Civil Rights Act to begin with but assumed that they were. Indeed, except for Judges Friendly and Mansfield, none of the judges who wrote opinions undertook to discuss, let alone resolve this question.

In Judge Kaufman's view

> "federal jurisdiction in cases involving prisoner rights is [no] more offensive to the state than federal jurisdiction in the areas of police procedures for search, arrest and detention . . . or education . . . or welfare . . . or public housing . . ." (8a)

In any event, neither this reason nor the increasing burden on the federal courts is a "tolerable basis for declining jurisdiction where a prisoner specifically alleges facts indicating a callous disregard of his basic human and unconstitutional rights, see *Haines* v. *Kerner*, 406 U.S.L.W. 4156 (U.S., Jan. 13, 1972)" (8a).

Judge Kaufman reasoned that allowing inmates the option of proceeding under the Civil Rights Act would not subvert the exhaustion requirement of the habeas corpus statute since 28 U.S.C. § 2254(b) is intended to apply only where the original conviction and sentence are being challenged (8-9). In so doing he ignored the fact that in *Wilwording* this Court assumed the applicability of the exhaustion requirement to such claims if brought by way of habeas corpus. On the other hand, Judge Kaufman relied upon the fact that in *Wilwording* this Court *sua sponte* construed the petition as in the nature of a civil rights action and he concluded from this that inmates have an option to use either procedure.

"I find it difficult to believe that the Court, confronted with the alternative modes of pleading, overlooked or did not consider fully the interaction of 28 U.S.C. § 2254(b) and 42 U.S.C. § 1983." (9a)

Judge Feinberg also rejected the applicability of the exhaustion and abstention doctrines suggesting that in view of the overwhelming numbers of "frivolous prisoner peti-

tions" some fair way of dealing with the problem is called for but it must come by way of a statute from Congress

> "which could take into account the conflicting policy considerations and could include compromises, limitations and safeguards that one as a court cannot legislate." (10a)

Judge Mansfield stated that prior to *Wilwording* he believed that

> "a federal court, upon its finding that the prisoner was seeking equitable relief [in a § 1983 complaint which could not be treated as a petition for habeas corpus] and was afforded an adequate state court remedy (as here), had the discretionary power as a court of equity to defer action pending the prisoner's application to the state court for relief. . . . Upon the prisoner's showing that the state would not afford a reasonably prompt and fair hearing, on the other hand, the federal court would be required to proceed." (10-11a)

In support of this view Judge Mansfield emphasized both the competence and convenience of the state courts in regard to this particular type of claim. He also cited statistics which attest to the

> "extent to which state prisoners' *habeas corpus* petitions have been dressed up in a § 1983 suit of clothes, often merely with a view to the prisoner's availing himself of the change of scenery offered by federal facilities. . . ." (11a)

Judges Oakes disputed the suggestion that the federal courts are being flooded by frivolous claims of state prisoners but if such a burden has been created the solution must come from the Legislature. He further expressed his "vehement disagreement" with the opinions of Judge Friendly and Mansfield to the extent that they "imply

request to the Supreme Court to reconsider and overrule its own line of cases sustaining jurisdiction . . ." (12a).

Judge Lumbard dissented together with Judges Hayes and Moore stating that he favored reversing and remanding to the District Court "with directions to stay further proceedings pending a hearing of the claims in the state court" (13a).

Judge Lumbard acknowledged that *Wilwording* suggests that state prisoners need not exhaust their state judicial remedies prior to invoking § 1983 but pointed out that in that case it was clear that Missouri Courts did not review such claims. By contrast, New York "does provide an adequate remedy in its courts for the redress of legitimate prisoner complaints" (14a) [citing Section 79-c of the New York Civil Rights Law] and, therefore, except in cases of on-going physical brutality, he would require prior resort to this remedy.

Although this Court's decisions in *Monroe* v. *Pape*, 365 U.S. 167 (1961), *McNeese* v. *Board of Education*, 373 U.S. 668 (1963), *Damico* v. *California*, 389 U.S. 416 (1967) and *Houghton* v. *Schafer*, 392 U.S. 639 (1968) have been relied upon to reach the contrary conclusion, Judge Lumbard emphasized the fact that only *Houghton* involved a state prisoner's claim and there was no evidence there regarding the nature of state remedies available.

> "In any event, the Court did not pass on the considerations which seem to me to compel the conclusion that the federal courts should not hear these cases in the first instance where the state courts are ready, willing and able to give relief." (14a)

These considerations include the state's interest in resolving disputes between "inmates and jailers", the greater convenience of hearing these claims in nearby state courts and the potential for increasing tension in the institution as a result of permitting review in the federal courts (13a). Judge Lumbard cited by way of example the

dislocation caused by the lengthy hearing in *Sostre* v. *McGinnis*, 442 F. 2d 178 (2d Cir. 1971) (*in banc*). If the state court hearing is not full and fair, the inmate would still have available a *de novo* review in the federal court.

Judge Lumbard included statistics showing that the number of civil rights actions filed in the Second Circuit by state prisoners has increased from 21 in 1966 to 88 in 1971 and disputed that § 1983 was intended to "be the means whereby state prisoners would place state authorities on trial for the manner in which they were cared for and disciplined in state prisons" (16a). Although more habeas corpus petitions are filed Judge Lumbard pointed out that many of these can be disposed of on the papers whereas many § 1983 actions require hearings and the testimony of witnesses. Furthermore, in habeas corpus

> "a record has already been made in the state court, whereas civil rights cases always raise issues which have recently arisen and are wholly undetermined." (17a)

Judge Lumbard warned that unless the district courts defer these matters to the state courts as a matter of discretion, "the federal courts will find themselves in the business of running and regulating state prisons" (17a).

## REASONS FOR GRANTING THE WRIT

**These cases present the important and recurring question of whether prisoner claims regarding the conditions of confinement should properly be brought by way of habeas corpus or under the Civil Rights Act. This issue has never been resolved by this Court and the numerous and conflicting opinions of the Court of Appeals demonstrate the necessity for such a resolution.**

The Second Circuit heard the instant cases *in banc* not because of the substantive issues raised but in order to

resolve the recurring question of who should initially hear complaints by state prisoners relating to the conditions of their confinement. It is evident from the many opinions filed with the Court's order that prior to this Court's per curiam decision in *Wilwording* v. *Swenson*, 404 U.S. 249 (1971), the Court of Appeals was equally divided on this important question. Moreover, even after *Wilwording* three judges joined in a vigorous dissent and many in the majority were reluctant about the conclusion reached.

The concern for how these cases should be reviewed is entirely warranted as increasing numbers of state prisoners make known their grievances by proceeding under the Civil Rights Act instead of under the habeas corpus statute which has a specific exhaustion requirement. This trend will inevitably result in the practical restriction of the habeas corpus statute to attacks on the original conviction and sentence. Moreover, in view of the already congested condition of the federal civil dockets the impact of this trend will not only be felt by the courts but ultimately by the prisoners as well.*

The threshold question which is critical to a determination of whether these cases are properly a burden to be borne by the federal courts—at least in the first instance—is whether they should be treated as civil rights actions or as habeas corpus petitions. With the exception of Judges Friendly and Mansfield this question was not

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*Chief Judge David N. Edelstein of the United States District Court for the Southern District of New York in a speech before the New York County Lawyer's Association stated that as of December 31, 1971, there was a backlog in the Southern District of 13,944 civil cases. New York Law Journal, February 3, 1972, Page 1, Col. 4.

considered by the Second Circuit which instead simply examined the need to exhaust under the Civil Rights Act.*

Furthermore, the Court of Appeals relied upon this Court's opinion in *Wilwording* although the proper nature of the cause of action was neither discussed in the opinion nor presented by the parties in that case who instead were concerned solely with the exhaustion requirement of 28 U.S.C. § 2254(b) as applied to the habeas corpus petition there involved.

We believe that the unmistakable trend toward state prisoner reliance on the Civil Rights Act requires a specific examination of whether this is an appropriate remedy given the existence of the habeas corpus statute.

We further believe that the result of such an examination must be that these applications are habeas corpus and must first be presented to the state courts.

At the outset, unlike other persons who seek to assert a constitutional claim, state prisoners have a specific stat-

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* The evident confusion of the Court below is typical of other cases decided within the Second Circuit. See *Oswald, et al.* v. *Gesicki, et al.*, 336 F. Supp. 365 (S.D.N.Y. 1971) (*Lasker*, J.) (jurisdictional statement filed March 9, 1972) (3 judge court convened in action to declare unconstitutional former N.Y. Code of Criminal Procedure § 913-a, the "wayward minor" statute and to invalidate adjudications made pursuant to it); *Royster* v. *McGinnis*, 332 F. Supp. 973 (S.D.N.Y. 1971) (3 judge court) (probable jurisdiction noted, 40 U.S.L.W. 3449, March 20, 1972) (declared unconstitutional N.Y. Correction Law § 230(3) which precludes the earning of good conduct time credits during pre-trial incarceration); *Gomes* v. *Miller*, —— F. Supp. —— 71 Civ. 2411 (S.D.N.Y. April 14, 1972) (3 judge court) (declared unconstitutional state procedure for committing defendants not yet tried to Matteawan State Hospital).

In *Gomes*, although the plaintiffs were not protesting the conditions of their confinement but only the lawfulness of the procedure by which they were confined, the majority, citing *Wilwording*, held that exhaustion of state judicial remedies was not required. In any event, according to the majority, the case could not be classified as habeas corpus because granting the relief sought by the plaintiffs would not result in their release from custody.

statory vehicle for obtaining judicial review which was enacted by Congress and tailored for state prisoners where the gist of the cause of action goes to their custody. 28 U.S.C. § 2241. Therefore, a decision that these cases are civil rights actions would not merely ignore the challenge to custody common to each but would effectively override the intention of Congress.

Moreover, the concept of custody has been expanded by this Court and, concomitantly, so has the relief available by way of habeas corpus. It is now clear that

> "the statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted. It provides that '[t]he court shall . . . dispose of the matter as law and justice require.' 28 U.S.C. § 2243. The 1966 amendments to the habeas corpus statute seem specifically to contemplate the possibility of relief other than immediate release from physical custody. At one point, the new § 2244(b) (1964 ed., Supp. II) speaks in terms of 'release from custody or other remedy.'" *Carafas* v. *LaVallee*, 391 U.S. 234, 239 (1968).

As this Court observed in *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963):

> "[The writ of habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."

Thus, recent cases have applied the habeas corpus remedy to questions of solitary confinement, *future* release (*Peyton* v. *Rowe*, 391 U.S. 54 [1968]; *United States ex rel. Meadlows* v. *New York*, 426 F. 2d 1176 [2d Cir. 1970]; *Wilson* v. *George*, 399 U.S. 224 [1970]) and conditions of

confinement imposed by prison authorities. *Johnson* v. *Avery*, 393 U.S. 483 (1969). See *"Developments in the Law—Federal Habeas Corpus"*, 83 Harv. L. Rev. 1038, 1079-1087 (1970); see also *Smith* v. *Follette*, 445 F. 2d 870 (2d Cir. 1971); *United States ex rel. Schuster* v. *Herold*, 410 F. 2d 1071 (2d Cir. 1969), cert. den. 396 U.S. 847; *Strowder* v. *Shovlin*, 380 F. 2d 370 (3d Cir. 1967).

And in *Wilwording* this Court specifically acknowledged that the Eighth Amendment claims there raised relating to "living conditions and disciplinary measures . . . in maximum security confinement" were "cognizable in federal habeas corpus." 404 U.S. at 249, 251.

*A fortiori*, habeas corpus should be the means of questioning the legality of the duration of custody in good conduct time cases, all of which relate in essence to the right to future release. But see *Landman* v. *Royster*, 333 F. Supp. 621, 650-51 (E.D. Va. 1971). In fact, in the instant cases, restoration of good time credits which had been either withheld or forfeited resulted in respondents' release from physical confinement.* Similarly, claims affecting parole eligibility and parole revocation are natural cases for consideration by way of habeas corpus. *Daugherty* v. *Craven*, 422 F. 2d 7 (9th Cir.), *cert. denied* 397 U.S. 964 (1970); *Morris* v. *Wingo*, 421 F. 2d 651 (6th Cir. 1970); *Murphy* v. *Turner*, 426 F. 2d 422 (10th Cir. 1970).

The habeas nature of all of these cases is not altered by the underlying constitutional issues raised any more than an ordinary habeas corpus application challenging the inmate's conviction is altered by variations in the underlying constitutional claim involved. In both situations the essence of the proceeding is the *legality of custody* and the exhaustion requirement attaches.

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* Release from custody is the traditional and typical relief sought by way of habeas corpus and is unavailable under the Civil Rights Act. A subsequent disavowal by the successful applicant that this was his purpose in bringing the action is both unrealitic and legally irrelevant. Section 2254(a) says nothing about motive.

If state prisoners nevertheless have the option of presenting their grievances under the Civil Rights Act, this Court's expansion of the writ will necessarily be halted as inmates seek to avoid the exhaustion requirement of 28 U.S.C. § 2254(b). The practical consequence must be that habeas corpus relief will be confined to cases involving the validity of the original conviction and sentence. Before this Court sanctions such a result it should squarely examine the implications of doing so.

**The Implications for the State Prisoner:**

The State prisoner who proceeds under the Civil Rights Act may escape the application of the exhaustion requirement but he also sacrifices the protections available to him under the habeas corpus statute.

Habeas corpus is a flexible, efficient, summary mechanism for redressing extraordinary grievances and is an ideal remedy for reviewing prisoner claims which are almost universally instituted *pro se*. Because it is a summary remedy there is an emphasis on swift determination. The habeas corpus timetable is as follows:

> "The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.
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> • • •
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> When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.
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> • • •
>
> The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." (28 U.S.C. § 2243).

Since the availability of the writ has been so dramatically expanded in recent years, good cause frequently is

shown for a greater time for preparation for a habeas corpus hearing. Nonetheless when the statute was amended in 1966 (Pub. L. 89-711, November 2, 1966), the time limits of 28 U.S.C. § 2243 remained intact.

In addition the statute imposes an affirmative duty of disclosure on the respondent:

> "(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination." (28 U.S.C. § 2254[e]).

Flexibility inheres in the fact that the District Court is empowered to dismiss applications which are frivolous on their face without even requiring a response by the respondent. The statute thereby satisfies the two overriding requirements in these cases—that non-meritorious claims be culled out as early as possible and that meritorious claims be considered as swiftly and completely as possible.

As this Court emphasized in *Harris* v. *Nelson*, 394 U.S. 286, 291 (1969):

> "The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by

courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected."

By contrast, the filing of a complaint under the Civil Rights Act initiates an original plenary civil action governed by the full panoply of the Federal Rules of Civil Procedure. Unlike habeas corpus, which under *Townsend* v. *Sain*, 372 U.S. 293 (1963) puts great responsibility for formulating the issues and ascertaining the facts upon the District Court (See also *Harris* v. *Nelson, supra* at 300) in an ordinary civil action the parties must formulate the issues and ascertain the facts with as little supervision from the Court as possible. The procedural formalities are far more complex.

For example, the rules of discovery are applicable (Federal Rules of Civil Procedure, Rules 26-37) and, in essence, serve one of the functions automatically served by the exhaustion requirement of the habeas statute, i.e., formulation and narrowing of issues for determination. Aside from creating a procedural problem for the typical *pro se* plaintiff, the discovery devices also afford an opportunity for abuse simply because incarcerated persons would be delighted by the prospect of requiring persons in authority to answer their questions and do their bidding. Even when a prisoner is represented by counsel in such a case, the relationship between the party and his attorney is such that counsel has less tactical control than in the ordinary civil litigation.

However, the option of proceeding under the Civil Rights Act has even more significant ramifications in terms of when the claims asserted will ultimately be determined. As a practical matter, when a *pro se* complaint is received the State most frequently serves and files an answer. After that the case will lie dormant, often for years. In some cases this may be the result of the plaintiff's ignorance regarding the procedures for putting the case on the

trial calendar or for moving for summary judgment. In other cases the delay simply reflects the fact that the case has become part of the District Court's backlog of civil non-jury cases. Whatever the cause for delay it has been the experience of this office that the typical pro se application for habeas corpus is decided more expeditiously and with less of a burden on the applicant than is the typical civil rights action.

**The Implications for Federal-State Relations:**

In addition to providing a procedure which is better geared to protecting the interests of the *pro se* litigant, utilization of the habeas corpus remedy serves the principle of comity by means of the exhaustion requirement. That principle has as much relevance in the area of state prison administration as in cases where the original conviction and sentence are being challenged. Indeed, Chief Judge Friendly suggests that it may have more relevance.

And Judges Lumbard, Moore and Hays, dissenting, are so concerned about the impact on federal-state relations of prisoner litigation under the Civil Rights Act that they would require exhaustion of state judicial remedies as a prerequisite to federal review where, as here, such remedies are adequate.*

Traditionally the federal courts have expressed reluctance to intervene in this area except in the most egregious

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* Judge Lumbard correctly points out that in *Houghton* v. *Shafer*, 392 U.S. 639 (1968), a per curiam decision, the record did not show what state judicial remedies were available to review the inmate's claim. This Court merely addressed itself to the question of administrative remedies. See "Exhaustion of State Remedies Under the Civil Rights Act", 68 Colum. L. Rev. 1201 (1968); Note, "Limiting the Section 1983 Action in the wake of *Monroe* v. *Pape*, 82 Harv. L. Rev. 1486 (1969). In *Wilwording* v. *Swenson*, also a per curiam decision, it was clear from the record that the Missouri Courts do not review claims by state prisoners regarding the conditions of their confinement. In the instant cases, state judicial remedies were found to be adequate and available by the three dissenting judges and by Judge Mansfield as well. None of the respondents ever attempted to utilize these remedies.

cases. *Wright* v. *McMann*, 387 F. 2d 519 (2d Cir. 1967); *Nieves* v. *LaVallee*, 293 F. 2d 233 (2d Cir. 1961); *Johnson* v. *Avery*, 393 U.S. 483 (1969); *Douglas* v. *Sigler*, 386 F. 2d 684, 688 (8th Cir. 1967); *United States* v. *Marchese*, 341 F. 2d 782, 789 (9th Cir. 1965). It therefore becomes even more important to require that state prisoner complaints be presented by way of a remedy which mitigates the irritation to federal-state relations.*

This consideration has particular relevance for two reasons. First the State has promulgated new and far-reaching regulations relating to discipline procedures as well as other areas of prison administration. It should have the initial opportunity to see that they are being properly implemented.** Second, because of the nature of

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*Respondents argued in the Circuit Court that the exhaustion requirement would not be applicable because historically it was intended to apply only to attacks on the validity of convictions. Apparently, there was no unanimity about this point among the Court. For example, Judge Friendly assumed it would be applicable. Judge Kaufman, on the other hand, viewed the requirement more restrictively. It is clear from this Court's opinion in *Wilwording*, however, that the exhaustion requirement is a prerequisite to both situations.

**Significantly, neither respondents nor the Court below have ever taken into account the fact that the relief typically sought by federal prisoners who challenge a forfeiture of good conduct time (18 U.S.C. § 4161) is habeas corpus (*McKinney* v. *Taylor*, 344 F. 2d 854 [10th Cir. 1965]; *Powell* v. *Hunter*, 172 F. 2d 330 [10th Cir. 1949]; *Sullivan* v. *Ciccone*, 311 F. Supp. 456 [W.D. Mo. 1970]; *Lloyd* v. *Heritage*, 199 F. Supp. 46 [N.D. Ga. 1961]) and that a prerequisite to habeas corpus review in these cases is the exhaustion of available administrative remedies. *Smoake* v. *Willingham*, 359 F. 2d 386 (10th Cir. 1966); *United States ex rel. Weyrich* v. *Parker*, 268 F. Supp. 785 (M.D. Pa. 1967). See also *Light* v. *United States*, 430 F. 2d 932 (5th Cir. 1970) (federal prisoner claiming interference with right to consult with counsel required to exhaust administrative remedies).

In *Coffin* v. *Reichard*, 143 F. 2d 443, 445 (6th Cir. 1944), where a federal prisoner claimed that he had been physically mistreated, the Sixth Circuit held:

"The fact that a person is legally in prison does not prevent the use of habeas corpus to protect his other inherent rights."

It would be illogical to draw a distinction between federal and state prisoner actions in this area.

prison administration, potential litigation arises on a day-to-day basis and is most efficiently handled where the alleged violations occurred.

Judge Mansfield correctly drew attention to the fact that the State Courts are not only indisputably competent to apply federal constitutional principles but also are physically and practically in a better position to do so. With the exception of the Wallkill Correctional Facility, State Supreme Court judges sit on a regular basis at each of the State's correctional facilities to "hear applications for writs of habeas corpus *or other proceedings* regarding detention or confinement." *Wright* v. *McMann*, 321 F. Supp. 127, 130 (N.D.N.Y. 1970). In *Wright* District Judge Foley characterized this as "the acme of judicial service."*

Thus, inmates may present their grievances to a court at the place of their confinement where the relevant records are available and where potential witnesses usually are located. Under this system inmates are in a position to press their claims without the delay occasioned by the geographical obstacles which arise when they seek relief in the federal courts.

Judge Kaufman suggests that the State is no more sensitive to federal jurisdiction in cases involving prisoners' complaints than it is to federal jurisdiction in the areas of education, welfare, public housing and police procedures for search and arrest. We respectfully disagree. The area of prison administration is unique.

The relationship of state prisoners and the officers of the State who supervise their confinement is far more intimate than that of the State and a private citizen. For state prisoners eating, sleeping, dressing, washing, work-

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* This language was not affected by the decision of the Second Circuit which affirmed in part, modified in part and reversed in part the orders of the District Court. (2d Cir., March 16, 1972, St. Sh. Op. 2131).

ing and playing all are done under the color of state "statute, ordinance, regulation, custom or usage" (42 U.S.C. §1983).

Thus, the possibility for Federal litigation is limitless. What for a private citizen would be an altercation with his landlord, a difference with his employer, a dispute with a clothier, an argument with a neighbor, a family feud becomes, for the prisoner, a federal case. *Landman v. Royster*, 333 F. Supp. 621, 644 (E.D. Va. 1971).

The geometric increase in the number of colorable claims which must be formally processed as civil actions bears witness to the validity of the State's concern in this area. In 1970 the number of non-habeas corpus petitions filed by state prisoners in the federal courts increased by 41 per cent over 1969, and by 430 per cent over 1963. *Wilwording v. Swenson*, 439 F. 2d 1331, 1333 n. 3 (8th Cir. 1971).

These numbers also bear witness to the increasing burden on federal courts already plagued by backlogs on the civil calendar. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 428-9 (1971). Judges Feinberg and Oakes argue that this problem is one for the Legislature. We believe, however, that the solution lies not with the Legislature but in the already existing applicable habeas corpus statute.

Respondents have never offered any substantial reason why claims of this nature are not properly treated as habeas corpus but throughout have simply relied upon their fears that if these are habeas corpus and the exhaustion requirement attaches they may never obtain review in the federal courts. That fear is a separate issue and is insufficient to defeat an otherwise valid classification.

The Court below assumes that the claims may be decided under the Civil Rights Act based upon this Court's deci-

sion in *Wilwording* v. *Swenson* which also rests on assumption.

In the instant petition we are asking this Court to examine the validity of this assumption and resolve the question of where state prisoner complaints should be heard.

## CONCLUSION

**For the foregoing reasons, the instant petition for a writ of certiorari should be granted.**

Dated: New York, New York, April 21, 1970.

Respectfully submitted,

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State of New York
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## Appendix A.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

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No. 889—September Term, 1969; Nos. 255 and 336—September Term, 1970; Nos. 354, 355 and 356—September Term, 1971.

(Argued to the *in banc* court November 4, 1971 decided January 25, 1972.)

Docket Nos. 34567, 35300 and 35253

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EUGENE RODRIGUEZ, and the UNITED STATES OF AMERICA *ex rel.* EUGENE RODRIGUEZ,

*Petitioner-Appellee,*

v.

PAUL D. MCGINNIS, Commissioner of Correction; RUSSELL G. OSWALD, Chairman of the Board of Parole; J. EDWIN LAVALLEE, Warden and Chairman of the Prison Board of Clinton State Prison; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTION,

*Respondents-Appellants.*

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UNITED STATES *ex rel.* MICHAEL KATZOFF,

*Petitioner-Appellee,*

v.

PAUL D. MCGINNIS, Commissioner of Correction of the State of New York and JOHN T. DEEGAN, Warden of Auburn State Prison, Auburn, New York,

*Respondents-Appellants.*

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*Appendix A.*

JOHN KRITSKY, and UNITED STATES OF AMERICA *ex rel.* JOHN KRITSKY,

*Petitioner-Appellee,*

v.

PAUL D. MCGINNIS, Commissioner of Correction; RUSSELL G. OSWALD, Chairman of the Board of Parole; J. EDWIN LAVALLEE, Warden of Clinton State Prison, NEW YORK STATE BOARD OF PAROLE and NEW YORK STATE DEPARTMENT OF CORRECTION.

*Respondents-Appellants.*

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Before:

FRIENDLY, *Chief Judge,*
LUMBARD, WATERMAN, MOORE, SMITH,
KAUFMAN, HAYS, FEINBERG, MANSFIELD,
MULLIGAN, OAKES and TIMBERS,
*Circuit Judges.*

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The District Court for the Northern District of New York having, by order dated December 23, 1969, directed the release of petitioner Eugene Rodriguez, on the ground that he was unconstitutionally deprived of good behavior time credit, in an opinion reported at 307 F. Supp. 622, and a panel of this court by decision dated March 16, 1971, slip opinions 4745, September Term 1969, having reversed said order by a divided vote;

The District Court for the Northern District of New York having, by order dated August 18, 1970, directed the release of petitioner Michael Katzoff, on the ground that he was unconstitutionally deprived of good behavior time credit, and this court by decision dated March 29, 1971, 441 F.2d 558, having reversed said order by a divided vote;

## *Appendix A.*

The District Court for the Northern District of New York having by order dated June 12, 1970, directed the release of petitioner John Kritsky, on the ground that he was unconstitutionally deprived of good behavior time credit, and this court having heard but not decided the State's appeal therefrom;

This court, by order dated July 19, 1971, having directed that the appeals in such cases be reheard *in banc*, the three appeals being consolidated for argument since they presented the same legal issue, before an *in banc* court which would consist of the judges who should be in active service on the date of decisions along with members of the respective panels who had taken senior status, and the court having received further briefs and heard oral argument, it is

Ordered that the said judgments of the District Court for the Northern District of New York be and they hereby are affirmed upon consideration of the merits and upon the authority of *Wilwording* v. *Swenson*, No. 70-5308, decided by the Supreme Court of the United States on December 14, 1971.

/s/ HENRY J. FRIENDLY
Henry J. Friendly, *Chief Judge*

January 25, 1972.

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FRIENDLY, *Chief Judge*, with whom MULLIGAN, *Circuit Judge*, joins concurring:

Although I had previously voted for reversal in these cases, it seemed to me that once *Wilwording* v. *Swenson* was decided by the Supreme Court on December 14, 1971, 40 U.S.L.W. 3277, the proper course for the *in banc* court was to affirm the orders of the district court without writing opinions, and to leave it to the State of New York to assert possible distinctions by petitions for certiorari. Now that

several of my brothers have chosen to dissent in an opinion I feel obliged to explain my own position.

I agree with Judge Lumbard that petitions of state prisoners complaining of the time or conditions of their confinement have the same potentialities for exacerbating federal-state relations as petitions attacking the validity of their confinement—perhaps even more. That federal concern on this score is not limited to challenges to the validity of convictions is evidenced by cases such as *Ex parte Royall*, 117 U.S. 241, 251 (1886), from which the exhaustion requirement sprang, and *Dye* v. *Johnson*, 338 U.S. 864 (1949), *reversing per curiam*, 175 F.2d 250 (3 Cir. 1949). On the other hand, I cannot accept the conclusion that if such petitions are properly viewed as invoking 42 U.S.C. § 1983, a federal court can require exhaustion of state judicial remedies, if these are available. This is not simply because of the Supreme Court pronouncements which, except for the summary dispositions in *Houghton* v. *Shafer*, 392 U.S. 639 (1968) and in *Wilwording* v. *Swenson*, were not in state prisoner cases, but because abstention would mean abdication in any case where the state afforded a fair hearing, whether the proper constitutional standards were applied or not. See *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1963); *Lackawanna Police Benevolent Ass'n* v. *Balen*, 446 F.2d 52 (2 Cir. 1971), and cases there cited.

The right answer, it seems to me, is that, under the broad scope the Supreme Court has given to the "Great Writ" as enacted by the Act of 1867, 14 Stat. 385, all state prisoner petitions complaining of the length or manner of custody, however phrased, are in fact petitions for habeas corpus "in behalf of a person in custody pursuant to the judgment of a state court . . . on the ground that he is in custody in violation of the Constitution or laws of the United States." *Jones* v. *Cunningham*, 371 U.S. 236, 243

(1963); *Walker* v. *Wainwright*, 390 U.S. 335 (1968); *Peyton* v. *Rowe*, 391 U.S. 54 (1968); *Johnson* v. *Avery*, 393 U.S. 483 (1969). If they are, 28 U.S.C. § 2254(b) forbids a federal court from proceeding in the first instance "unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner"—an exception sufficiently broad to enable a federal court to look at what the state courts actually do. Because of the inapplicability of *res judicata* in *habeas corpus*, recognition that such petitions are for that remedy also means that an aggrieved prisoner who has not received satisfaction at the hands of a state court can return to the federal court for a "final federal say" concerning the appropriate legal standard, although the federal court will be bound by proper state factual findings. I recognize that a number of cases, including *Houghton* v. *Shafer*, *supra*, and *Jackson* v. *Bishop*, 404 F.2d 571 (8 Cir. 1968), cited by the Court in *Wilwording*, have assumed that state prisoner complaints over the conditions of custody come under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) rather than under 28 U.S.C. § 2254. But the issue was not there raised, and the problem of such prisoner applications had not yet reached its present dimensions.

If this is the correct analysis, I do not understand how a state prisoner who is entitled to relief by *habeas corpus* under 28 U.S.C. § 2254 can opt out of that section, with its attendant requirement of exhaustion of state remedies when these are available, simply by styling his petition as one under the Civil Rights Act. But *Wilwording* seems to indicate that he can. For that reason I am constained to concur in affirming the orders of the district court.

*Appendix A.*

WATERMAN, *Circuit Judge* (concurring):

I concur in the affirmance of the judgments below and in the opinions of my brothers Smith, Kaufman, Feinberg and Oakes. And see my statement filed in *Rodrigues* v. *McGinnis et al.* (2 Cir. March 16, 1971).

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SMITH, *Circuit Judge* (concurring):

I concur in the affirmance of the judgments below and in the opinions of my brothers Kaufman, Feinberg and Oakes. As indicated in my dissent to the panel opinion in *Katsof*, 441 F.2d 558, 560, I would not hold that either abstention in deference to the state courts or exhaustion under the requirements of 28 U.S.C. § 2254(b) in *habeas corpus* actions may bar a prisoner from his choice of a federal forum in a civil rights action. I had thought that this was reasonably plain from *McNeese* v. *Board of Education*, 373 U.S. 668, 672 (1963), *Damico* v. *California*, 389 U.S. 416 (1967), *Houghton* v. *Shafer*, 392 U.S. 639 (1968), and our own course in *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971). *Wilwording* v. *Swenson*, —— U.S. ——, Dec. 14, 1971, bolsters that view.

Moreover, I question the desirability of even attempting to lighten our burden by stifling or delaying prisoners' complaints of unconstitutional abuse. It may be an onerous burden, especially in the districts where large state prisons are located. Many petitions are poorly prepared, confusing and mendacious. They do take the time of busy courts. But these cases now before us demonstrate that among them are some of substance, a circumstance which makes the effort worthwhile. It would be far better to provide more assistance in the districts which contain Attica and the other large institutions giving rise to these issues than

to deny redress within the federal court system for deprivation of civil rights.

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KAUFMAN, *Circuit Judge* (concurring):

The question which was presented to this court *in banc* is whether a state prisoner must exhaust state judicial remedies before he can bring an action for equitable relief under 42 U.S.C. § 1983, where his complaint charges that state prison officials have deprived him of fundamental personal rights. My unwavering answer to that question was that exhaustion is not required. Moreover, I agreed with Chief Judge Friendly that it was appropriate to dispose of these cases without opinions because of the Supreme Court's clear and unconditional holding in *Wilwording* v. *Swenson*, 40 U.S.L.W. 3277 (Dec. 14, 1971). Since my brothers have chosen to file opinions explaining their positions, I believe it is necessary for me to state the reasons for the views I held.

In *Wilwording* the Supreme Court instructed that: "State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs." This pronouncement was based on its decisions beginning with *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961), where the Supreme Court held that the federal remedy provided by § 1983 "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *See also McNeese* v. *Board of Education*, 373 U.S. 668 (1963); *Damico* v. *California*, 389 U.S. 416 (1967); *Houghton* v. *Shafer*, 392 U.S. 639 (1968). I note also that *Wilwording* emphasized that the result in no way depended upon the inadequacy of state remedies. Quoting from *Houghton* v. *Shafer*, *id.* at 640, it added: "in 'any event, resort to these remedies is unnecessary.'"

I believe, however, that I should state candidly that I did not construe *Wilwording* as a ground breaking decision. The opinion instead indicates the Court's clear deference to the doctrine of *stare decisis*. *See Monroe* v. *Pape*, 365 U.S. at 192 (Harlan, *J.*, concurring). And it was our adherence to the principles gleaned from the earlier Supreme Court decisions that led us to conclude in our recent *in banc* decision in *Sostre* v. *McGinnis*, 442 F.2d 178, 182 (2d Cir. 1971), that exhaustion of state legal or equitable remedies is not a prerequisite for a state prisoner to maintain a § 1983 action.

I do not intend to argue with statistics indicating that prisoner petitions are on the rise; nor shall I pretend that this condition is pleasing to Judges. But I cannot believe that federal jurisdiction in cases involving prisoner rights is any more offensive to the state than federal jurisdiction in the areas of police procedures for search, arrest and detention, *Monroe* v. *Pape*, *supra*, or education, *McNeese* v. *Board of Education*, *supra*, or welfare, *Damico* v. *California*, *supra*, or public housing, *Holmes* v. *New York City Housing Authority*, 398 F.2d 262 (2d Cir. 1968). I can think of no reason why the question of prison administration should be classified as one of greater or more peculiar state concern than the instances to which I have just referred. In any event, neither of the grounds articulated is a tolerable basis for declining jurisdiction where a prisoner specifically alleges facts indicating a callous disregard of his basic human and constitutional rights, *see Haines* v. *Kerner*, 40 U.S.L.W. 4156 (U.S., Jan. 13, 1972), or for reworking accepted principles of federal jurisdiction in one sweep of the judicial pen.[1]

The Supreme Court's decision in *Wilwording* will not lead to the subversion or circumvention of the *habeas* cor-

[1] I fully agree with my brother Friendly, for the reasons stated in his opinion, that abstention would be wholly inappropriate here.

pre-exhaustion requirement, codified in 28 U.S.C. § 2254(b), which is concerned with prisoner challenges to the validity of state court convictions or sentences. *See Sostre* v. *McGinnis*, 442 F.2d at 182. *See also Fay* v. *Noia*, 372 U.S. 391, 419-20 (1963); Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 172-73 (1948). Collateral attack on a final state court adjudication is *toto caelo* from an untried constitutional claim unrelated to a prior proceeding. Under these circumstances, I see no basis for radically expanding the impact of § 2254(b) or, to put it another way, for concluding that Congress intended by that section to carve out an exception to § 1983 for state prisoners challenging an invasion of their constitutional rights during confinement and stating a valid claim for equitable relief. Indeed, the *sua sponte* construction by the Supreme Court of Wilwording's petition as a complaint under § 1983 clearly stimulates that state prisoners alleging deprivation of constitutional rights by prison officials are not forced to mold their claim for relief in the form of a petition for a writ of *habeas corpus*. I find it difficult to believe that the Court, specifically confronted with the alternative modes of pleading, overlooked or did not consider fully the interaction of 28 U.S.C. § 2254(b) and 42 U.S.C. § 1983.[2]

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Timbers, *Circuit Judge* (concurring):

I agree with Judges Kaufman and Smith that under the authorities there is simply no basis for requiring these state prisoners to exhaust state judicial remedies as a condition to bringing an action for equitable relief under 42 U.S.C. § 1983. And I further agree with them and with

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[2] I agree with the views expressed by my brothers in their separate concurrences with this opinion.

Chief Judge Friendly that application of the abstention doctrine is not appropriate.

Were those my complete views on these cases, I would resist the temptation to add yet another opinion and would simply concur since my brothers have admirably and succinctly covered those issues. However, there is a further point——perhaps implicit in their opinions—that I believe should be made. If the already over-burdened federal courts are being overwhelmed by frivolous prisoner petitions, it surely is desirable to find some way of coping with that problem in a manner that is nonetheless fair and just to prisoners, whose claims of mistreatment have too often been ignored in the past. But the correct way to reach that result is not for us to indulge in judicial legislation but for Congress to enact an appropriate statute, which could take into account the conflicting policy considerations and could include compromises, limitations and safeguards that we as a court cannot legislate.

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MANSFIELD, *Circuit Judge* (concurring):

I concur in Judge Friendly's opinion. I would add that prior to *Wilwording* v. *Swenson*, 40 U.S.L.W. 3277 (U.S. Dec. 14, 1971) (*per curiam*), my view was that even though there might be cases where a state prisoner's complaint, purportedly brought pursuant to § 1983, could not be treated as a petition for *habeas corpus*, a federal court, upon its finding that the prisoner was seeking equitable relief and was afforded an adequate state court remedy (as here), had the discretionary power as a court of equity to defer action pending the prisoner's application to the state court for relief. See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944); *Alabama* v. *United States*, 304 F.2d 583, 590 (5th Cir.), *aff'd. per curiam*, 371 U.S. 37 (1962);

*Pugach* v. *Dollinger*, 277 F.2d 739, 742 (2d Cir. *en banc* 1960), *aff'd.*, 365 U.S. 458 (1961). Upon the prisoners's showing that the state would not offer a reasonably prompt and fair hearing, on the other hand, the federal court would be required to proceed.

The competence of New York state courts to apply federal constitutional principles is not disputed. In most instances their facilities are closer to the state prison in which the prisoner-plaintiff is located (and where regular state court sessions are held) than is the nearest federal court. Furthermore the state court is in a position to insure greater cooperation on the part of essential state personnel (*e.g.*, local and state police, clerks, sheriffs, court reporters and officers of state and county departments) than is the federal court. For example, unless *Wilwording* is limited, suits for injunctive relief by prisoners of one of New York's largest institutions, Clinton Prison, Dannemora, Clinton County, must be heard by the United States District Court for the Northern District of New York, which is located in Albany, 180 miles away. The single federal judge, with only two holding cells and two deputy marshals at his command, will face the necessity of bringing prisoner-plaintiffs and other prisoner-witnesses on a 360-mile round trip in federal custody. By way of contrast, the New York Supreme Court for Clinton County, with no appreciable calendar problem, is equipped to hold court in a nearby county courthouse or in the prison itself.

The extent to which state prisoners' *habeas corpus* petitions have been dressed up in a § 1983 suit of clothes, often merely with a view to the prisoner's availing himself of the change of scenery offered by federal facilities, is attested to by statistics compiled by the Administrative Office of the United States Courts. The 1971 Annual Report of the Director reveals (Table 14, II-48) that from 1968 to 1971 state prisoners' *habeas corpus* petitions in the United States district courts increased 30%, whereas civil

rights suits increased 170%, and that from 1970 to 1971 such *habeas corpus* petitions declined 7.6%, while such civil rights petitions increased 43.6%.

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OAKES, *Circuit Judge* (concurring):

I concur in the affirmance of the judgments below and in the opinions of Judges Smith and Kaufman, agreeing as I do with the original reasoning of Judge Waterman in his dissent in *Rodriguez* v. *McGinnis*, Docket No. 34567 (2d Cir., Mar. 16, 1971), and Judge Smith in his dissent in *Katzoff* v. *McGinnis*, 441 F.2d 558, 560 (2d Cir. 1971). It is not my impression that the federal courts are being overwhelmed with frivolous prisoners' petitions—indeed many have been highly meritorious. But I agree with Judge Feinberg that if the courts were so burdened, judicial legislation is not the appropriate method of meeting the problem.

To the extent that the dissenting opinion of Judge Lumbard and the concurring opinions of Chief Judge Friendly and Judge Mansfield make arguments directed to the Congress that warrant further reply, that reply, it seems to me, may more appropriately be made in some place other than a judicial opinion. To the extent that those same opinions imply a request to the Supreme Court to reconsider and overrule its own line of cases sustaining jurisdiction, the most recent of which may be *Haines* v. *Kerner*, 40 U.S.L.W. 4156 (U.S., Jan. 13, 1972). I would simply register my vehement disagreement.

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TIMBERS, *Circuit Judge*, concurs in the opinions of Judges Smith, Kaufman and Feinberg.

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*Appendix A.*

LUMBARD, *Circuit Judge* (dissenting), with whom MOORE and HAYS, *Circuit Judges*, concur:

I dissent.

Three petitioners seek federal [redacted] orders which would direct state prison authorities to take action to correct allegedly unconstitutional treatment.

Michael Katzoff, formerly an inmate of Green Haven Correctional Facility serving a sentence of one to three years for possession of a dangerous weapon, complains that the state acted unconstitutionally in depriving him of good behavior time as punishment for recording offensive remarks in his dairy.

Eugene Rodriguez, formerly an inmate of the Ossining Correctional Facility serving a term of one and one-half to four years for the crimes of perjury and attempted larceny, complains that the state unconstitutionally canceled good time for either possession of contraband or refusal to disclose its source.

John Kritsky, presently an inmate of Clinton Correctional Facility serving a sentence of 15 to 18 years for the crime of armed robbery, complains of unconsitutional deprivation of good time because of his participation in an inmate strike at Auburn Correctional Facility.

All these actions were brought under 42 U.S.C. § 1983, and in each case the district court granted relief to the petitioner. I would reverse the orders of the district courts and remand with directions to stay further proceedings pending a hearing of the claims in the state court.

Prior to *Wilwording* v. *Swenson*, decided December 14, 1971, 40 U.S.L.W. 3277, I had hoped that these three cases could be resolved, consistent with Supreme Court authority, by a requirement of exhaustion of state remedies as a condition precedent to a cause of action in the federal courts under the Civil Rights Act by a state prisoner seek-

ing equitable relief from allegedly unconstitutional prison conditions or sanctions. *Wilwording* suggests the contrary, but it dealt with an inmate in a Missouri prison and Missouri apparently makes no provision for hearing such cases in its courts.[1] I still think there is room to hold that a district court in New York—which does provide an adequate remedy in its courts for the redress of legitimate prisoner complaints[2]—should refrain from hearing such a case until the state court has acted thereon, so long as ongoing physical brutality is not involved, as it was in *Inmates of Attica* v. *Rockefeller*, decided by this court December 1, 1971, slip op. p. 739.

I am not unmindful that what the Court has said per *curiam* in *Wilwording* follows much that was said along the same lines in *Monroe* v. *Pape*, 365 U.S. 167 (1961), *McNeese* v. *Board of Education*, 373 U.S. 668 (1963), *Damico* v. *California*, 389 U.S. 416 (1967), and *Houghton* v. *Shafer*, 392 U.S. 639 (1968). Only in *Houghton*, however, was the petitioner serving a sentence in a state prison, and it does not appear from the record what, if any, remedies were available to Houghton in the Pennsylvania state court. In any event, the Court did not pass on the considerations which seem to me to compel the conclusion that the federal courts should not hear these cases in the first instance where the state courts are ready, willing and able to give relief.

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[1] *See Wilwording* v. *Swenson*, 40 U.S.L.W. 3277 (Dec. 14, 1971).

[2] *See* Civil Rights Law § 79-c, McKinney's Consol. Laws c. 6, which was added in response to this court's decision in *Wright* v. *McMann*, 387 F.2d 519 (1967). This amendment, "remedial in nature, designed to correct an imperfection in the prior law or to provide a remedy for a wrong if none previously existed, is to be liberally construed so as to spread its beneficial results as widely as possible. . . ." *Marcelin* v. *Scott*, 304 N.Y.S. 2d 299, 300-301 App. Div. 1969).

*Appendix A.*

The resolution of differences between inmates and jailers in state prisons is peculiarly a matter of state interest and concern. These matters can better be determined by the state court which is nearby and available for immediate resolution of such disputes. For some years justices of the Supreme Court of the State of New York, the highest trial court of general jurisdiction, have held court in courtrooms within the confines of the prisons. Thus the petitioning prisoner and any necessary witnesses can be heard with a minimum of risk and expense. By contrast, a hearing in the federal courts requires that prisoners must be moved considerable distances under circumstances presenting a danger of escape and injury to members of the public, to say nothing of substantial expense to the state.

Recent unrest and dissatisfaction in New York state prisons reached a tragic climax at Attica Correctional Facility where a four-day inmate uprising took a death toll of 11 hostages and 32 inmates. Allowing a state prisoner the choice of being heard in a federal court would seem an obvious means of exacerbating relations between state prisoners and their jailers. Obviously the holding of a hearing at a distant federal court is a far greater interruption of prison life and routine than a hearing inside a state prison by a state judge. *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971) *(en banc)*, is a good example of what may frequently be involved in a federal court hearing. That case was tried before Judge Motley in the Southern District of New York during seven days of trial extending from Wednesday, October 29, 1969 to Friday, November 7, 1969. In addition to Sostre, who was brought from Walkill Correctional Facility, Walkill, New York, to testify, two other state prisoners were transported to the hearing from Green Haven Correctional Facility, Stormville, New York. The warden, the food service manager, a doctor, and eleven guards from Green Haven testified. Five guards from Attica Correctional Facility, Attica, New York, testi-

fied, as did one from Clinton Correctional Facility, Dannemora, New York.

If the federal courts must hear these suits and resolve factual issues, it is a clear invitation to state prisoners to frame complaints of alleged mistreatment so that they will, at the least, be afforded some vacation from the tedium of prison life.

It could hardly have been the intention of the Congress in enacting § 1983 that it would be the means whereby state prisoners would place state authorities on trial for the manner in which they were cared for and disciplined in state prisons. But there can be no doubt that it is becoming the fashion for state prisoners to bring these suits. The totals for state prisoner civil rights suits commenced in the federal courts of the Second Circuit for the past six fiscal years[1] tell the story—

| | |
|---|---|
| 1966 | 21 |
| 1967 | 62 |
| 1968 | 72 |
| 1969 | 138 |
| 1970 | 277 |
| 1971 | 585 |

All but 38 of the 585 cases filed in 1971 were filed in the four districts of New York. While these totals for state prisoner civil rights suits are still less than those for state prisoner *habeas corpus* petitions in the Second Circuit, which have risen from 571 to 813 in those same years, it should be borne in mind that a very high percentage

[1] These figures are a breakdown of the national totals reported in Table 14 in the 1971 Criminal Report of the Director of the Administrative Office of the United States Courts, prepared by the Division of Information Systems of the Administrative Office.

of the *habeas corpus* petitions can be, and are, disposed of on the face of the petition or after submission of a paper record. By contrast, a very large percentage of Civil Rights Act cases can be disposed of only after a hearing at which the petitioner and others will be produced as witnesses. In the *habeas corpus* cases a record has already been made in the state court, whereas civil rights cases always raise issues which have recently arisen and are wholly undetermined.

It is now quite clear that state prisoners are turning more and more to the Civil Rights Act to redress their grievances and for therapeutic relief, rather than to *habeas corpus*. They not only hope to get an earlier hearing but they also expect a vacation from prison confinement. Unless the district courts can, in the exercise of discretion, stay their hands pending determination of suit in those state courts which will hear the cases, the federal courts will find themselves in the business of running and regulating state prisons.

If the course I propose is followed, certainly it would still be open to the state prisoner to ask the federal court to examine his complaint *de novo*, upon a showing that the state court hearing had not been a full and fair one. *Cf. Townsend* v. *Sain*, 372 U.S. 293 (1963), and 28 U.S.C. §2254(d).

For the above reasons, I would direct the district courts in the three cases before us to stay action until the state court has passed upon the matters complained of by these state prisoners.

## Appendix B.

## UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 899—September Term, 1969.

(Argued July 16, 1970 Decided March 16, 1971.)

Docket No. 34567

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EUGENE RODRIGUEZ, and the UNITED STATES OF AMERICA *ex rel.* EUGENE RODRIGUEZ,

*Plaintiff-Appellee,*

—v.—

PAUL D. MCGINNIS, Commissioner of Correction; RUSSELL G. OSWALD, Chairman of the Board of Parole; J. EDWIN LAVALLEE, Warden and Chairman of the Prison Board of Clinton State Prison; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTION,

*Defendants-Appellants.*

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Before:

WATERMAN, MOORE and HAYS,

*Circuit Judges.*

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Appeal from a judgment of the United States District Court for the Northern District of New York, James T. Foley, *Chief Judge*, ordering the reinstatement of 120 days good behavior credit withdrawn from appellee while he was a prisoner in a New York State prison.

Judgment reversed.

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*Appendix B.*

RICHARD A. KOHN, Albany, N. Y., *for Appellee.*
BRENDA SOLOFF, Asst. Attorney General (Louis J. Lefkowitz, Attorney General, Samuel A. Hirshowitz, First Asst. Attorney General, Lillian Z. Cohen, Asst. Attorney General, on the brief), *for Appellant.*

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HAYS, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Northern District of New York in an action brought by a state prisoner under 28 U.S.C. § 2242 (1964) and 42 U.S.C. § 1983 (1964). After an evidentiary hearing, the district court held that the cancellation by defendants of 120 days of plaintiff's earned good behavior time,[1] was unconstitutionally imposed. The defendant Commissioner of Correction of the State of New York was ordered to restore the remaining period of good behavior time credit to plaintiff. As a consequence of this order plaintiff was released from prison on December 24, 1969, although remaining subject to the supervision of the New York Board of Parole. We reverse the judgment of the district court.

In view of the basis for our disposition, only a brief summary of the facts is necessary. Rodriguez, having been convicted in a New York state court of perjury and attempted grand larceny, was sentenced to imprisonment for an indeterminate term of from one and one-half years to four years. Under New York law, a prisoner serving an indeterminate sentence may elect to participate in a con-

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[1] Credit for such time would have reduced appellee's period of incarceration by 120 days.

ditional release program by which he may earn up to 10 days per month good behavior or time credit toward the reduction of the maximum term of his sentence. Appellee chose to elect this program. Optimally a prisoner so electing may be released under the supervision of the Board of Parole, after having served but two-thirds of his maximum sentence, Correction Law § 803 (McKinney 1968), Penal Law §§ 70.30(4)(a), 70.40(1)(a) and (b) (McKinney 1967); accrued good behavior allowances so earned, however, may at any time be withdrawn in whole or part for bad behavior or for violation of institutional rules. Correction Law § 803(1) (McKinney 1968).

Appellee was charged in two separate disciplinary action reports, dated October 31, 1968, with possession in his cell of five contraband letters written by his wife, and with having six pornographic photographs of his wife in his possession received through illegal channels. The Deputy Warden adjudged that 120 days of the prisoner's earned good behavior time should be cancelled as punishment, "60 days for the letters and 60 days for the pictures." In the "Remarks" section of each judgment was a statement to the effect that appellee had refused to disclose how he had managed to get possession of the uncensored items. The district judge found that this and various other disciplinary actions meted out to Rodriguez (segregation in Sing Sing for a day and a half, segregation in Clinton Prison for several weeks) were really designed to compel these disclosures from appellee. He believed that the imposition of the penalty was a deprivation of Rodriguez' right to due process because the prison regulations prescribed no penalty for refusal to inform. He further found that the Commutation Board at Clinton Prison, which reviews all cases involving forfeiture of good time, failed to comply with a statute directing the Board to forward its

reasons for the disallowance of the good behavior time in writing to the Commissioner of Correction and he characterized this failure as the chief basis for his ruling. Correction Law § 236 (McKinney 1968). We cannot agree with the trial judge's view that questions of constitutional significance are involved.

Even if we were inclined to affirm the decision on the merits we would be compelled to reverse on the ground that appellee has failed to exhaust his state remedies.

Section 2254(b) and (c) of Title 28 U.S.C. require state prisoners who apply for federal habeas corpus to show that they have exhausted state remedies. State prisoners are increasingly resorting to the Civil Rights statutes in order to circumvent the requirements of Section 2254. The present application, since it seeks release from custody, is in fact an application for habeas corpus. "[R]elease from penal custody is not an available remedy under the Civil Rights Act." *Peinado* v. *Ault Authority*, 405 F.2d 1185, 1186 (9th Cir.), cert. denied, 395 U.S. 968 (1969). In *Johnson* v. *Walker*, 317 F.2d 418, 419-20 (5th Cir. 1963) the court said:

> "Use of the Civil Rights Statutes to secure release of persons imprisoned by State Courts would thus have the effect of repealing 28 U.S.C. § 2254; of course, such was not the intent of Congress."

The "chief basis" of the district court's order is founded on error. The provision of § 236 of the Correction Law under which the prison commutation boards forward their reasons for disallowing good behavior time in writing to the Commissioner of Correction is not constitutionally required. Moreover, a letter from Warden Deegan to Commissioner McGinnis dated November 1, 1968 (Defendant's Exhibit "C") was sufficient to satisfy the statutory re-

quirement, since it contained all the information that would have been included in a letter from the Board to the Commissioner. In any case, even if the requirement of § 236 had federal significance, the most that appellee would be entitled to is a decree ordering the board to forward a report to the Commissioner.

Although punishment for refusing to reveal the sources of his contraband would not reflect any constitutional infirmity, it is quite clear that Rodriguez did not lose his good behavior time for refusal to inform but for possession of the contraband. After the punishment was ordered he was given an opportunity to reduce his lost good time credit by revealing the source of the contraband. This procedure, commonly used in law enforcement efforts, certainly does not violate any constitutional right.

The issue in this case is typical of the increasing number of trivial questions of internal prison discipline now being brought, in the first instance, before the federal courts. If the results were not so serious for the administration of justice through state and federal procedures, the spectacle of a federal court of appeals solemnly deciding on the penalty in terms of good time a state prisoner should receive for having dirty pictures in his cell (or for refusing to be a tattle tale) would be so absurd as to be laughable. But if this court entertains actions of this kind it will encourage state prisoners who have any kind of "beef" to bring such actions and the federal courts will end up sitting as prison boards of discipline in the state prisons.

The federal courts should refuse to interfere with internal state prison administration except in the most extreme cases involving a shocking deprivation of fundamental rights. See, e.g., *Church* v. *Hegstrom*, 416 F.2d 449, 450-51 (2d Cir. 1969); *Wright* v. *McMann*, 387 F.2d 519 528 (2d Cir. 1967) (concurring opinion of Lumbard, *Ch.J.*); *Sostre*

v. *McGinnis*, 334 F.2d 906 (2d Cir.), cert. denied, 379 U.S. 892 (1964); *Jackson* v. *Bishop*, 404 F.2d 571, 577 (8th Cir. 1968) (Blackmun, *C.J.*). A case such as the instant one, which is totally devoid of merit, should be dismissed out of hand.

At a minimum such cases should first be filtered through the state prison administrative process and the state courts. In *Wright* v. *McMann*, Chief Judge Lumbard said:

> "We are not called upon this time to decide whether Wright would be heard upon his constitutional claims in federal court without first applying for statutory relief in a state court if the New York legislature had given to inmates of its prisons the right to apply for injunctive relief against improper treatment. I would hold that if a state made provision for such relief in its courts the federal courts should abstain for a reasonable period to allow the state courts to hear the complaint and take appropriate action. I do not agree that recent decisions of the Supreme Court mandate or were intended to mandate action by federal courts in all cases involving the treatment of prisoners in state institutions, without a suitable period of abstention where state courts are empowered to hear the case and where there is reason to believe that the state would grant relief if the complaint were well founded. The disciplining of state prisoners is so peculiarly a matter in the discretion of the state, and the possibilities that prisoners will file groundless and numerous complaints in the federal courts are so obvious, that these cases raise 'special circumstances' that make it appropriate to treat them as an exception to the caveat or policy against abstention by federal courts."

The prisoner should be remanded to serve the sixty odd days remaining of his sentence, or, if he chooses, to make

an application through state administrative or judicial processes for the relief he seeks.

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WATERMAN, *Circuit Judge* (dissenting):

I respectfully dissent. I would affirm the judgment entered in the Northern District of New York.

In this action brought by a state prisoner under 28 U.S.C. § 1343 and 42 U.S.C. § 1983, Judge James T. Foley, Chief Judge of the United States District Court for the Northern District of New York, after an evidentiary hearing in which the prisoner and the state officer defendants testified and presented exhibits, adjudged that the cancellation by defendants of 120 days of plaintiff's earned good behavior time which, if not canceled, would have reduced his period of incarceration by 120 days was unconstitutionally imposed. The district judge therefore ordered that the defendant Commissioner of Correction of the State of New York restore the remaining period of good behavior time credit to plaintiff. As a consequence of this order plaintiff, although remaining subject to the supervision of the New York State Board of Parole, was entitled to an immediate release from prison, and he was so released on Christmas Eve, 1969.

The facts are fully set forth in the able opinion filed below by Judge Foley in *Rodriguez* v. *McGinnis*, 307 F. Supp. 627 (N.D.N.Y. 1969), and need to be but briefly reiterated for the purpose of this dissenting opinion.

On February 14, 1967, Rodriguez was sentenced in a New York State court to imprisonment for an indeterminate term of from one and one-half years to four years. According to New York law, a prisoner serving an indeterminate sentence may elect to participate in a conditional release program whereby he may earn up to 10 days per month

good behavior time credit toward the reduction of the maximum term of his sentence. Optimally, under this program, a prisoner may be released, under the supervision of the Board of Parole, from prison incarceration after having served but two-thirds of his maximum sentence, Correction Law § 803, Penal Law §§ 70.30(4)(a), 70.40(1)(a) and (b), but accrued good behavior allowances so earned may at any time be withdrawn in whole or in part for bad behavior or for violation of institutional rules. Correction Law § 803(1). Appellee chose to elect the conditional release program.

On October 30, 1968, while he was imprisoned in Sing Sing, Rodriguez was charged in a "disciplinary action" report with having in his possession five uncensored, and therefore contraband, letters written to him by his wife. He was similarly charged on the following day with having in his possession six uncensored pornographic photographs. These items were taken from him and turned over to the Deputy Warden. On October 31 it was adjudged by the prisoner's interrogator, the Principal Keeper, the Deputy Warden, that 120 days of the prisoner's earned good behavior time were canceled in order to punish him, "60 days for the letters and 60 days for the pictures." The judgment entered on each of the reports set forth that appellee refused to disclose how he managed to get possession of the uncensored items.[1] Judge Foley, upon hear-

[1] The pertinent notations as to the letters follow:

JUDGMENT

60 days. . . .

Remarks: Inmate refuses to disclose who had arranged to get the contraband letters to him.

/s/ R. TREANOR
Deputy Warden

Items held in Warden's office.

*(continued on following page)*

ing appellee's testimony, discredited the "disciplinary action" reports to the following extent, 307 F. Supp at 631:

> The plaintiff's version given at the trial contradicts these disciplinary reports. He testified he was never confronted with written charges or the contraband. From the beginning, and I also find, the questioning was solely in regard to how he got the uncensored letters and photographs into Sing Sing.

It is clear that, as Judge Foley found, the real motive behind the continuing pattern of punishment, first the cancellation of the 120 days good behavior time earned by a year's good behavior at Sing Sing, second, the immediate incarceration in the "Box" there for a day and a half, and third, the prompt transfer to Clinton Prison following that incarceration, where the confinement in segregation lasted from entry there on November 1 until the first week in December, was not designed to punish Rodriguez for his possession of uncensored mail but rather was designed to compel him to disclose the channel through which he obtained the uncensored items, or, as the majority says, to "tattletale."

Judge Foley also found that the Commutation Board at Clinton Prison, which reviews all cases in which good time has been forfeited by a disciplinary officer, failed to obey the command of the New York statute, and did not forward

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(*footnote continued from previous page*)

The pertinent notations as to the photographs follow:

JUDGMENT

60 days. Inmate was adamant in refusal to disclose method by which the pornographic photographs were passed to him.

Remarks:
Pictures held in Warden's office.

/s/ R. TREANOR
Asst. Superintendent

in writing to the Commissioner of Correction its reasons for withholding appellee's good behavior time. Correction Law §§ 235, 236.

Based on the above, the experienced district judge expressed concern that this pattern of events may well not have comported with "ordinary due process requirements" and stated, . . . I am not sure the disciplinary officer or an officer of a review board can assume legally the investigative mantle and become prosecutor, judge and jury, and in this instance really the Appellate Court of Review." 307 F. Supp. at 632. I share his concern.

The judge indicated, also, that "the chief basis" for his decision was the failure of the prison commutation board to forward the reasons for its action to the Commissioner and that this failure deprived appellee of due process and equal protection of the law. *Id.*

Had Judge Foley found that the prison authorities had only proceeded against Rodriguez by confronting him with a charge of violating prison rules in that he possessed uncensored items, had given him a full opportunity to answer only those charges, and then had failed to forward to the Commissioner of Correction the reasons for taking away good behavior time as punishment for the infractions, I would not consider such a statutory violation to constitute such a deprivation of due process as to warrant a federal tribunal in granting relief. However, on the facts found by Judge Foley, it is my belief that this panel has no other valid option but to conclude that the procedures appellee was subjected to in relation to the uncensored mail did not meet the minimum constitutional requirement of "fundamental fairness."

Rodriguez began his drawn out confrontations with prison officials over a simple infraction of prison rules, the possession of uncensored material. Although he was "officially" charged with that simple infraction, official attention soon focused on Rodriguez's refusal to "tattletale"

and to incriminate others who might have aided him in receiving the contraband.[3] It is apparent from the severity of

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[3] Rodriguez testified as to the initial Sing Sing confrontation as follows:

> I was in the visiting room. My wife was visiting me, and an officer came over and told her that the visit was terminated. She left. I was told to remain. A few minutes later, the officer took me to the Warden's office. . . . The Warden said to me "How did you get these uncensored letters into Sing Sing?"
>
> * * * * *
>
> I told him I had nothing to say. He then summoned somebody else and told him "Take him to the box."

Rodriguez testified with reference to the second confrontation at Sing Sing that he was taken from the box to the Deputy Warden's office by a guard. The colloquy follows:

> He said to me, the first thing he said to me, is "Look, Gene, I know that it is a waste of time asking you anything, but I want to know how uncensored letters got into Sing Sing." I said, "I have nothing to say." He said—he then said, "If you don't tell me I am going to take sixty days for the letters and sixty days for the pictures, to run consecutively." I didn't say anything. He then said, "I can give you back this lost time, give you back all your lost time." I said, "I have nothing to say."
>
> Q. Now is that the end of the conversation with the P.K.? A. That was it.
>
> Q. And how long were you in this room, total time A. Oh, wait, there was something else that was said. He said, "You are being transferred to Clinton." He said, "You are being transferred to Clinton, Gene, tomorrow." I said, "Thanks for telling me." Then he said, "Good luck to you." I said, "Good luck to you." We shook hands and I walked out. I was there two minutes or maybe three minutes.

Upon his arrival at Clinton Prison Rodriguez testified that he was immediately taken away to the box there without any further hearing. As to the confrontations at that prison, Rodriguez testified:

> While I was in the box on three separate occasions the Warden weekly would have me brought up to his office. . . . The Warden would have me brought up to his office and he

*(continued on following page)*

his punishment, first, the wiping away of a year's accrued credit for a year's good behavior and the resulting assessment of four months additional incarceration, and second, segregation "in the Boxes" of the two prisons for a total of more than 40 days, that the punitive measures were not initiated for possession of uncensored letters and photographs but in order to coerce him to tattletale and to divulge information that would inculpate other residents of Sing Sing.

It would seem, then, that the failure of the commutation board to forward its reasons for its actions was merely a part of the pattern of continued procedural dereliction Judge Foley found, and, as the facts he found are not clearly erroneous, and, on the record, I am not convinced that Judge Foley made any mistake in finding the facts as he found them, I approve the conclusion that he necessarily drew from these facts that the coercive procedures adopted by the prison authorities to obtain Rodriguez's confession did not comport with the due process the accused, then a prisoner in custody, was entitled to.

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(*footnote continued from previous page*)

said to me—what he did was this. He said "Sit down." When I sat down he said, "Look, you are an educated man. . . ."

The Court: How often did he do this?

The Witness: He did it three times.

The Court: All right.

The Witness: He did it three consecutive weeks. He said, "Look, you are an educated man." The first time "I want to know how the unauthorized letters got into Sing Sing. I don't like to keep you in the box. You didn't do anything at Clinton but I have to as part of the continuing investigation." I said, "I have nothing to say." He said, "You are going to continue to lose good time and you are going to stay in the box." He said, "We have it narrowed down to two men anyway, so that if you tell us you will save yourself all this aggravation." So I answered him, I said, "Well, if you have it narrowed down to two men, then you don't need me."

So he had me taken out.

*Appendix B.*

Although not raised before the court below, or considered there, appellee urges us to hold that the imposition of this punishment because he remained silent in the face of interrogation was a violation of his fifth amendment privilege against self-incrimination, citing *Spevack v. Klein*, 385 U.S. 511 (1967). The defendants respond by pointing out that Rodriguez at the hearing before Judge Foley admitted having the uncensored items in his possession and that his refusal to talk was not motivated by any fear of criminal prosecution for possessing the items. This is most assuredly so as to the possession of the contraband, but the prison authorities' questions were not directed at seeking a confession with respect to the contraband; no confession was necessary or needed, he was "caught with the goods." The questions were directed at discovering how the letters and photographs were smuggled past prison censors. The obvious import of the interrogation was the discovery of the identity of the "insider" or "insiders" (prison guards, etc.) who must have enabled Rodriguez to receive the uncensored items. Had Rodriguez answered the prison officials, and implicated certain persons employed by the prison, he would also, of course, be implicating himself in the conspiracy to circumvent censorship and he could reasonably expect further developments to follow any disclosure he might make.[3] The ramifications of the interrogation were twofold. The information sought would not only open the door for a probable criminal charge against a prison official but also, as Rodriguez would also be a party to the official's criminal act, a possible criminal charge against Rodriguez.[4]

Rodriguez may have been motivated to remain silent solely because of a fear of retaliation by his confederate,

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[3] See N.Y. Penal Law § 20.00 and, for example, N.Y. Penal Law § 200.00.

[4] See, e.g., among several penal provisions, N.Y. Penal Law §§ 195.00, 195.05, 200.00, 200.20, 205.20.

whether a prison guard or other prison employee, or even another inmate. But the fifth amendment protection protects irrespective of the subjective motives that prompt one to be silent. If the information sought by officers may tend to incriminate one who is being questioned, he has an absolute right to remain silent. Although "[a]nswers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying," *Gardner* v. *Broderick*, 392 U.S. 273, 276 (1968), (citing cases), no immunity from prosecution was offered in this case to Rodriguez. Nor is it any answer to say that if Rodriguez had talked under the compulsion of the threats of segregation in the box and the loss of good time credits such compulsion would have rendered his statements or the fruits thereof "coerced" and therefore inadmissible against him in a criminal prosecution. See *Garrity* v. *State of New Jersey*, 385 U.S. 493 (1967). Absent an assurance that his statements could not be used against him, we cannot assume appellee was aware of any implicit immunity he would enjoy if criminal charges for a complicity in violation of law were brought against him. Cf. *Gardner* v. *Broderick*, *supra*, at 278-279.

I would point out, therefore, that under the circumstances present in this case the fifth amendment privilege against self-incrimination was a bar to the punishment imposed—punishment which obviously was not imposed for the possession of uncensored letters and photographs but imposed solely for the purpose of compelling appellee to divulge incriminating information. However, the pertinence of the fifth amendment's protection was not brought to the attention of the trial court and I find it unnecessary to uphold the decision below by reliance upon it. With reference to the issue that was presented to Judge Foley, his factual findings are not clearly erroneous and his conclusion drawn therefrom that appellee was deprived of due process seems to me to be incontrovertible. I would affirm.

## Appendix C.

EUGENE RODRIGUEZ, and the United States of America ex rel. Eugene Rodriguez, Plaintiff-Petitioner,

v.

PAUL D. MCGINNIS, Commissioner of Correction; Russell G. Oswald, Chairman of the Board of Parole, J. Edwin LaVallee, Warden and Chairman of the Prison Board of Clinton State Prison; New York State Board of Parole; and the New York State Department of Correction, Defendants-Respondents.

No. 69-CV-348.

United States District Court
N. D. New York.
Dec. 23, 1969.

MEMORANDUM—DECISION AND ORDER

JAMES T. FOLEY, Chief Judge.

This typewritten pro se complaint under the Civil Rights statutes is combined with a petition for a writ of habeas corpus. It rarely occurs, but the plaintiff-petitioner forwarded to the Clerk the prescribed statutory fees for filing the complaint and petition. This form of application demonstrates again the ingenuity of state prisoners in following a pattern of a pleading that brought successful results. A similar combined application,—and I had direct contact with the case,—was filed in this Court in Daniel, and U. S. ex rel. Daniel v. McGinnis et al., in 69-CV-118, and was lawyer-prepared by the firm of Rabinowitz, Boudin & Standard, Attorneys in New York City. This same firm recently obtained a preliminary injunction from District Judge Motley, of the Southern District of New York, in Sostre v. Rockefeller et al., 68 Civ. 4058, by decision dated

September 4, 1969, for an inmate of Green Haven Prison, New York, involving a claim based upon 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983, statutes upon which jurisdiction for this action is based. Judge Motley stated flatly the Court had jurisdiction. Applying the legal principles to be followed in preliminary injunction applications, she ruled that keeping the plaintiff Sostre in segregation for more than a year on account of disciplinary charges may be totally disproportionate to the offenses charged and thus violative of the Eighth Amendment. It was stated that the plaintiff had demonstrated clear probability of success upon a final determination of the merits. The injunction restrained the Warden from holding the plaintiff in punitive segregation and from depriving him of the rights and privileges of the general prison population until final determination was made. The trial has been held, briefing directed, and the matter is under consideration. In the meantime, I understand the preliminary injunction has been complied with and Sostre was released from segregation. Reference is made to this action and the preliminary ruling to indicate again that no matter the reluctance of the past, it is now settled beyond question that claims of this kind alleging federal constitutional deprivation by State prisoners, if not frivolous on their face, are within the jurisdiction of the federal courts under the Civil Rights Act and must be entertained and determined.

This fact should be recognized and accepted, because there is an increasing volume of judicial writing and comment to this effect. It is clear, as so well stated, that we have come a long way from some earlier attitudes toward rights of prisoners. (Jackson v. Godwin, 5 Cir., 400 F.2d 529.) Our own Circuit in Wright v. McMann, 2 Cir., 387 F.2d 519, at page 522, the noted case that involved a New York prisoner confined in segregation at Clinton Prison, remarked that the older cases retain little vitality;

that there is no longer any question a state prisoner may bring an action under the Civil Rights Act, citing among other cases, Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030; and that the harshest blow to the old "hands-off" doctrine was struck by Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492. It is settled too that the due process and equal protection processes of the Fourteenth Amendment follow prisoners into prison. Washington v. Lee (D.C.N.D.Ala.), 263 F.Supp. 327, 331; aff'd per curiam, 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212). The Civil Rights statutes, when relied upon for federal jurisdiction, do not require the exhaustion of state judicial remedies. (Houghton v. Shafer, 392 U.S. 639, 88 S.Ct. 2119, 20 L.Ed.2d 1319; D'Amico v. California, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed. 647; McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622; Monroe v. Pape, supra; Wright v. McMann, supra, 387 F.2d at p. 524).

Specifically, in this instance, although the Assistant Attorney General tries to convert the complaint into solely a habeas corpus petition that alone, of course, would entail the usual requirement for exhaustion of state remedies, to my mind the habeas corpus petition in the combination here is merely a proper adjunct to insure full relief if the plaintiff prevails in the dominant civil rights claim. (See Bell v. Hood, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939; Jones v. Peyton (E.D.Va.), 294 F.Supp. 173; United States ex rel. Stuart v. Yeager (D.C.New Jersey), 293 F. Supp. 1079; 28 U.S.C. § 1651). Cases directly in point that sustain in my judgment jurisdiction under the particular, narrow claim and issues raised thereby by this plaintiff-petitioner are: United States ex rel. Campbell v. Pate, 7 Cir., 401 F.2d 55, 57; Landman v. Peyton, 4 Cir., 370 F.2d 135; Sewell v. Pegelow, 4 Cir., 291 F.2d 196).

These federal authorities are set forth not as comprehensive review of all the law on the subject. Such fed-

eral writings are referred to merely to give several examples that there is full recognition by the federal courts that the primary authority and responsibility for prison administration and discipline remains, and should remain, with the State administrative personnel, and that the federal courts are never inclined to reach out to intrude unless,—and this is an important "unless" that New York should recognize,—there is sufficient showing procedures and regulations exist that impair the constitutional rights of prisoners. (Jordan v. Fitzharris (N.D.California), 257 F.Supp. 674, 680; Baxstrom v. Herold, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620; United States ex rel. Schuster v. Herold, 2 Cir., 410 F.2d 1071; cert. den. 396 U.S. 847, 90 S.Ct. 81, 24 L.Ed.2d 96.) This position is no more than a simple, common-sense one that is in accord with the American desire for fairness within its prison systems and such philosophy has been heralded in this day from a variety of sources. The new Chief Justice of the United States, Justice Burger, in an address to the American Bar Association, called for a comprehensive and profound examination into our penal system from beginning to end, and among the details he thought should be examined are the standards and programs for release. (American Bar Association News, Vol. 14, p. 5). Chief Judge Lumbard in his concurring opinion in Wright, supra, 387 F.2d at page 527, referred to—and I think recommended in effect to New York—consideration of the hearing procedures and safeguards set forth in the Task Force Report on Corrections, issued in May 1967 by the President's Commission on Law Enforcement and Administration of Justice. (See also State Prisons and the Free Community, Judge Jiudice, New York State Bar Journal, December 1969, p. 672.)

The President of the United States a short time ago called for consideration of a ten-year program with enormous appropriations to undertake search for improve-

ments in the federal penal system that may become models for state corrections and prison administrators. Undeniably, change is in the air and the handwriting on the wall is big and black for all to see. States are making important changes in regard to promulgation of effective, fair procedures where withholding, forfeiture and restoration of good time is involved. (Burns v. Swenson (D.C.W.D.Missouri), 288 F.Supp. 4.) To its credit, it was developed at the hearing in this action that effective March 1, 1969, the New York State Department of Correction issued "Revised Procedures Covering Disciplinary Matters". Plaintiff's Ex. 8.) Such enlightened approach is heartwarming to this District Court where increasing numbers of civil rights claims of the kind here are being filed by State prisoners.

I am a firm believer that the blemishes and mistakes in the procedures of the past are best corrected from within by adoption of fair and enlightened regulations and institutions bound to withstand attack in any court, and ultimately lead to the reduction of such alleged grievances. The Governor, the Correction Commissioner and the legal advisors for the Commissioner of Correction and the Wardens are the ones to lead the way. The best legal advice is that which anticipates difficulty and counsels the corrective measures that will reduce the challenge. A good example is the statement in Wright, 387 F.2d at p. 528 by Judge Lumbard: "The Attorney General has advised us that whatever may be the truth as to the condition of solitary confinement in a strip cell in 1965 and 1966, such conditions do not now exist." Of course, the Wardens, it seems, must have autonomy and wide authority for on-the-spot decisions but no one would contend that Wardens or their deputies should be permitted to become a law unto themselves. I am aware there is at times a guarded, almost hostile, attitude toward federal court intrusion into certain

aspects of State Prison affairs. That state of mind is unfortunate and the best way, I think, to dispel it is to advise the lay correction officers, whom I have found to be men of integrity and dedication, that new thinking in the law is prevalent and must be followed.

In this action, there is again set forth as an affirmative Second Defense: "The complaint fails to state a claim sufficient to establish the jurisdiction of this Court over the subject-matter." As I have tried to indicate, in my judgment, the defense is untenable and contrary to established law. Further, it is contended that the claim here regarding conditional release is in the same category as a parole problem. However, as so ably pointed out by the appointed attorney for the plaintiff-petitioner, there are solid and clear differences. Conditional release by express New York law is based upon computation of good behavior time and in my judgment is mandatory grant by its terms and nature if the prisoner so behaves. (See Penal Law, McKinney's Consol.Laws, c. 40, 70.-30(4) (a); 70.40(1) (b); 70.40(1) (a). The assertions for the Respondents that to me bear the implication good behavior time credit may be granted or withheld at the pleasure of the Warden and the Prison Commutation Board is answered by rulings in the New York Courts that such discretionary reductions cannot be arbitrarily withheld. (People ex rel. Stark v. Deegan (1968), 56 Misc.2d 567, 289 N.Y.S.2d 285; People ex rel. Roy v. Murphy, 36 Misc.2d 30, 233 N.Y.S.2d 282.) New York Courts have entertained these challenges, and it may be that the doctrine of temporary abstention should be applied to veer these challenges into the State Courts where I think they belong. However, and it is a bleak outlook for this 2-Judge District Court, the trend seems to the contrary. (Wright v. McMann, supra, 387 F.2d pgs. 524-525; McNeese v. Bd. of Education, 373 U.S. 668, 673-674, 83 S.Ct. 1433, 10 L.Ed.2d 622; Zwickler

v. Kootz, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed. 2d 444) Judge Friendly in a very recent writing reviewed the great expanse in the application of civil rights remedies to myriad human problems unthought of in other days (Eisen v. Eastman, 2 Cir., 421 F.2d 560, 11/28/69). Many questions remain unsettled in these actions. In this action my decision which will be adverse to the State provides a vehicle for appeal which I invite and welcome in order that at least some of the questions persistently raised by the State may be answered as correct or incorrect.

The statutes of New York that apply to the grant or withholding of good behavior time are set forth in Section 803 of the New York Correction Law, McKinney's Consol.Laws, c. 43. Such section, subdivision 1, explicitly legislates the requirement that good behavior time credit may be withheld or revoked by the prison board for "bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned." Subdivision 3 of the Section directs the Commissioner of Correction to promulgate rules and regulations in regard to these matters and subdivision 4 says the withholding, forfeiture, cancellation or restoration of such allowances shall be final and shall not be reviewable if made in accordance with law. This subdivision emphasizes for me the right of the Commissioner to be the final authority in these matters if the law is followed and also unquestionably possessing the power to restore the good time as the final administrative reviewing authority. In accord with Section 235 of the Correction Law there is established a Prison Commutation Board with authority to review all cases in which good time has been forfeited by the disciplinary officer and to restore or disallow any such good time revoked. By Section 236 of the Correction Law there is the provision highly important in my judgment in this situation that directs the Board where the allow-

...is withheld to "x forward with their report to the Commissioner of Correction their reasons in writing for such disallowance x". This direction is contained in the Miscellaneous Rules, 60.6(h), Regulations, Def.Ex. F.

In this action a hearing has been held, a satisfactory record made and transcribed. Plaintiff was sentenced in Bronx County to an indeterminate term of one and one-half to four years on February 14, 1967. The plaintiff-petitioner testified and the Head Clerk at Clinton Prison, Dannemora, New York, was the sole witness for the Respondents. There are a number of exhibits in this record that enlighten as to the inmate and employee rules, and the disciplinary and review procedures in the New York prison system. Also several exhibits have direct bearing on the incidents in which the plaintiff was involved and indicate their follow-up and aftermath through the higher echelon of the Correction officials. The plaintiff-petitioner's attack has been narrowed to 120 days good behavior time credit that was taken from him on October 31, 1967, while he was confined in Sing Sing Prison. The separate disciplinary Action reports dated October 31, 1967 (Def.Exs. A, B) charge in one possession of five contraband letters written by his wife in his cell along with other materials, and in the other having six pornographic photographs of his wife in his possession received through illegal channels. The judgment written in each instance is 60 days for a total of 120 days; the brief written comment in one report is plaintiff's refusal to disclose who had arranged to get the contraband into him, the other states he was adamant in refusal to disclose the method by which pornographic materials were passed to him.

The plaintiff's version given at the trial contradicts these disciplinary reports. He testified he was never confronted with written charges or the contraband. From the testimony, and I so find, the questioning was solely in re-

gard to how he got the uncensored letters and photographs into Sing Sing. The punishment effected seems different from the judgment report, inasmuch as the plaintiff says the decision was merely "take him to the Box". (Tr. 29-30.) After a two or three minute oral interview when the plaintiff would not talk, he was told by the Deputy Warden simply, he testified, "I am going to take 60 days for the letters and 60 days for the pictures". (Tr. 31-33.) The following day, plaintiff testified he was then transferred to Clinton Prison at Dannemora, New York, where he was immediately put in and kept in segregation from November to December. (Tr. 36.) The plaintiff testified he was brought before Warden LaVallee several times and told in effect he was an educated man, that the Warden did not like to keep him in the Box although plaintiff did not do anything wrong at Clinton, but he had to be kept there as part of a continuing investigation. (Tr. 44.) Plaintiff testified this pattern continued and when he was brought before the Commutation Board at Clinton Prison, which Warden LaVallee headed, for a review of the forfeiture of his good behavior time, he was again asked only by the Warden if he was going to talk about how letters got into Sing Sing and when he said he had nothing to say, he was told "to get out". (Tr. 51.) The plaintiff's estimate of the time period for this reviewing board appearance was 30 seconds.

These descriptions undisputed except by the two State report Exhibits give cause for concern that approved and short cut procedures did not permit fair hearing or proper consideration to such extent that would accord with ordinary due process requirements. Of course, it is understandable that maximum security prisons must employ subtle methods at times to insure that the security is not broken by devious schemes to get around the regulations promulgated in the interest of the safety of inmates and

correctional personnel. It is also appreciated that summary and swift procedures are necessary to process the day-by-day disciplinary infractions. However, I am not sure the disciplinary officer or an officer of a review board can assume legally the investigative mantle and become prosecutor, judge and jury, and in this instance really the Appellate Court of review. It may be seriously questionable whether refusal to inform can reasonably come under the category of a violation of institutional rules when there is none to such effect. A serious fault, I find, in the reports is that more severe punishment was imposed and inflicted upon the plaintiff than is indicated by the judgment descriptions in them which merely state 60 days loss of good time in each instance.

However, the chief basis for my ruling to uphold the complaint is a complete failure by the prison commutation board to forward as legislatively directed its reasons, in writing, to the Commissioner of Correction for the disallowance of the good behavior time. This board has important responsibilities delegated to it by the New York Legislature because the forfeiture of time assessed by the disciplinary court in the first instance, usually one officer, is merely a recommendation and it is not until the inmate appears before the prison board that the time credit forfeited is actually reviewed and finally assessed in whole or in part. A most important step therefore in these safeguards, of course, is the direction in Section 236 Correction Law that the board forward their reason, in writing, to the Commissioner when a disallowance is upheld in whole or in part. In this record, it is practically admitted that no reasons, in writing, were forwarded to the Commissioner, and I so find. (Tr. 18-20); (see also Pl.Ex. 9 for id.)

My conclusion is that the above omission is substantial and deprived the plaintiff-petitioner of due process

and equal protection of the law. My findings are contained herein. My judgment declared hereby is that the disallowance of 120 days and cancellation of 120 days good behavior credit time is void and unlawful as violative of the provisions of the Fourteenth Amendment of the United States Constitution. The Commissioner of Correction of the State of New York, a named respondent, is hereby directed to restore the remaining period of good behavior time credit to the plaintiff. Such allowance will entitle the plaintiff to release forthwith. The release of the plaintiff, of course, will be to parole supervision as required under New York law. If such release is not accomplished within a reasonable time, the attorney for the plaintiff shall submit a writ of habeas corpus to the effect such release. I hereby acknowledge my deep appreciation for the outstanding legal assistance given by Attorney Kohn to this Court at the hearing and by his competent and thorough briefing in this difficult and important matter. All exhibits I shall file with this decision with the Clerk of this Court.

Judgment shall enter in favor of the plaintiff granting the relief specifically outlined herein, and this decision is the judgment.

It is so ordered.

## Appendix D.

## UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 255—September Term, 1970.

(Argued September 17, 1970 Decided March 29, 1971.)

Docket No. 35300

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UNITED STATES OF AMERICA, *ex rel.*
MICHAEL KATZOFF,
*Petitioner-Appellee,*

—v.—

PAUL D. MCGINNIS, Commissioner of Corrections of the State of New York, and JOHN T. DEEGAN, Warden of the Auburn State Prison, Auburn, New York,
*Respondents-Appellants.*

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Before:

FRIENDLY, SMITH and HAYS,
*Circuit Judges.*

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Appeal from a decision and order of the United States District Court for the Northern District of New York, Edmund Port, *Judge,* ordering under 42 U.S.C. § 1983 (1964) the reinstatement of 50 days good behavior credit withdrawn from appellee while he was a prisoner in a New York State prison and directing his release in accordance with the laws and regulations of New York.

Reversed.

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*Appendix D.*

HERMAN SCHWARTZ, Buffalo, New York (Lee Michaels, Auburn, New York, on the brief), *for Appellee.*

LOUIS J. LEFKOWITZ, Attorney General of the State of New York Timothy F. O'Brien, Assistant Attorney General, on the brief), *for Appellants.*

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HAYS, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Northern District of New York in an action brought by a state prisoner under 42 U.S.C. § 1983 (1964). Following an evidentiary hearing, the district court found that the loss of 50 days of appellee's earned good behavior time was unconstitutionally imposed. The appellant Commissioner of Corrections of the State of New York was ordered to credit the 50 days of good behavior time to appellee and appellee was ordered released in accordance with the laws and regulations of New York. We reverse the judgment of the district court.

Appellee Katzoff was sentenced to three years imprisonment following his conviction in a New York State court for illegal possession of a dangerous weapon. Under New York Correction Law § 803 (McKinney 1968 & Supp. 1970) and Penal Law §§ 70.30(4)(2), 70.40(1)(a) and (b) McKinney 1967), prisoners are allowed to participate in a conditional release program by which they may earn up to 10 days per month good behavior time credit toward reduction of the maximum term of their sentences. Optimally, a prisoner so electing may be released under the supervision of the Board of Parole after having served approximately two-thirds of his maximum sentence (i.e., 20 days out of every 30). Good behavior allowances, however, may be

withdrawn at any time in whole or in part for bad behavior or for violation of institutional rules. N. Y. Correction Law § 803(1) (McKinney 1968).

In January 1968 while incarcerated in Green Haven prison, Katzoff's diaries which he was keeping with the knowledge of the prison authorities were taken away from him and examined. Disciplinary charges were brought against him for describing Deputy Commissioner Cain as a "creep" and a "cigar-smoking S.O.B." and for indicating in vulgar language his desire to have sexual intercourse with two nurses at the prison. Deputy Warden Gilligan deprived Katzoff of 30 days good time for these diary entries and confined him in segregation for 57 days. Katzoff ultimately lost 50 days earned good behavior time because of the diary entries—30 days penalty for his remarks as to Deputy Commissioner Cain and 20 days by not being able to earn any good time while in segregation.

The district court ruled, after holding an evidentiary hearing, that there was no regulation against the keeping of a diary (a fact conceded by the State) and that punishment for entries in a private diary violated appellee's constitutional rights to due process, equal protection of the law, and freedom of thought. The court also found that sending appellee to segregation for writing in his diary constituted cruel and unusual punishment and ordered that the prisoner be immediately credited with 50 days earned good time. Since this restoration of good time entitled Katzoff to immediate conditional release, the court on August 18, 1970 ordered entry of a judgment directing the prisoner's release within 2 days. Appellants' application to this court for a stay was denied after appellee agreed in writing that if the district court order were modified or reversed and resulted in additional time to be served, then appellee would surrender to serve such additional time.

We find it unnecessary to consider the merits of appel-

lee's constitutional arguments, for we find that appellee has failed to exhaust his state remedies as required by 28 U.S.C. § 2254(b) (Supp. 1959-1967) and therefore reverse the decision of the district court.

Although the district court stated that it regarded appellee's petition as alleging a violation of his civil rights and asking for a writ of habeas corpus only as incidental to the enforcement of any judgment which might issue, we find that appellee in seeking release from custody was in essence applying for a writ of habeas corpus. There is no basis for limiting the concept of habeas corpus to attacks on custody because of defects in the original conviction as distinguished from a failure to allow release according to law. "[R]elease from a penal custody is not an available remedy under the Civil Rights Act." *Peinado* v. *Adult Authority of Department of Corrections*, 405 F.2d 1185, 1186 (9th Cir.), cert. denied, 395 U.S. 968 (1969); *Johnson* v. *Walker*, 317 F.2d 418, 419-20 (5th Cir. 1963). In our recent opinion in *Rodrigues* v. *McGinnis*, Docket No. 34567, filed March 16, 1971, containing a similar application by a prisoner, we stated that the "present application, since it seeks release from custody, is in fact an application for habeas corpus."

As an application for a writ of habeas corpus, the petition is defective because there is no allegation that appellee exhausted his state remedies in accordance with the requirements of 28 U.S.C. § 2254(b) (Supp. 1959-1967). Katzoff has made no application whatsoever to the state courts, and there is no showing that an adequate state remedy is not available. There is no reason to believe that the New York courts are not fully equipped to decide whether New York prison officials may impose the discipline in question here under New York law (Correction Law § 236 (McKinney 1968)), and the New York and Federal Constitutions. Appellee's argument that the proxim-

ity of the prisoner's release renders state processes ineffective to protect his constitutional rights assumes without justification that state courts will be less responsive to a constitutional claim than the federal courts. There is no authority for the proposition that the proximity of release relieves a prisoner of the exhaustion requirements of Section 2254(b).

Reversed.

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Sirica, *Circuit Judge* (dissenting):

I respectfully dissent. I would not bar a civil rights action for failure to exhaust state remedies because of the exhaustion requirement of 28 U.S.C. § 2254(b). The appellant is not attempting to challenge the validity of his sentence as in *Johnson* v. *Walker*, 317 F.2d 418 (5 Cir. 1963) or *Peinado* v. *Adult Authority*, 405 F.2d 1185 (9 Cir. 1969). The recent *in banc* opinion of this court in *Sostre* v. *McGinnis*, —— F.2d —— (2d Cir. 1971), squarely holds that where a state prisoner is deprived of statutory good time as a penalty for his conduct, at least in a case involving first amendment rights, the federal courts have the power to order that it be restored. To make the availability of this remedy turn on the fortuitousness of the prisoner's timing in filing his section 1983 claim makes no sense in terms of either logic or judicial efficiency.

A civil rights plaintiff is entitled to choose a federal forum. If relief such as restoration of good time earned has the incidental effect of entitling him to immediate release, it should not deprive him of that choice. *McNeese* v. *Board of Education*, 373 U.S. 668, 672 (1963); *Bell* v. *Hood*, 327 U.S. 678, 683 (1946); *Damico* v. *California*, 389 U.S. 416 (1967); *Hancock* v. *Avery*, 301 F. Supp. 786 (M.D. Tenn. 1969); *Edwards* v. *Schmidt*, 321 F. Supp. 68 (W.D. Wisc. 1971).

## Appendix E.

### UNITED DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

70-CV-272

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UNITED STATES OF AMERICA, ex rel MICHAEL KATKOFF,

Petitioner

*vs.*

PAUL D. MC GINNIS, COMMISSIONER OF CORRECTIONS OF THE STATE OF NEW YORK, and JOHN T. DEEGAN, Warden of the Auburn State Prison, Auburn, New York,

Respondents

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The following proceedings took place on the 18th day of August, 1970 at the United States District Court, Northern District of New York, Federal Building, Auburn, New York before Hon. Edmund Port, United States District Judge.

Appearances:

MICHAEL KATKOFF, in person and by Lee S. Michaels, Esq., Attorney for Petitioner.

HON. LOUIS J. LEFKOWITZ, by Timothy O'Brien, Esq. of counsel, Attorney for Paul D. Mc Ginnis, etc. The Capitol, Albany, New York.

The Court: I am going to ask the reporter to transcribe the proceedings from this point on, and they will constitute the decision of the Court, the Findings of Fact and the Conclusions of Law, and when the same are transcribed they are to be filed with the Clerk.

*Appendix E.*

This is a proceeding brought by Michael Katzoff, Petitioner, against Paul D. Mc Ginnis, Commissioner of Corrections and John T. Deegan, Warden of Auburn State Prison. I believe that since the institution of the action, or shortly before the institution of the action, the Correction Law was amended, or it was amended earlier and effective shortly before this time, changing the title of the Warden to Superintendent, and the State Prisons to Correctional Facilities, is that correct, Mr. O'Brien?

Mr. O'Brien: That's correct, Your Honor.

The Court: All right. The title of the action will be considered amended accordingly.

After hearing the testimony, the arguments of counsel and of the parties, on due consideration, the Court makes the following Findings of Fact:

1. The Petitioner is confined in the Correctional Facility at Auburn, New York, formerly known as Auburn State Prison, in execution of a sentence of one to three years imposed by the Supreme Court of New York County on or about June 17, 1968; that at various times since then the Petitioner has been confined in Dannemora State Prison, Green Haven State Prison and Auburn State Prison in execution of the sentence. In addition, the Petitioner was confined in Sing Sing Prison.

It is the practice in the prison system of New York on the admission of an inmate, or shortly thereafter, to prepare an inmate record card, referred to as a warden's card or deputy warden's card, copies of which are kept on file in the warden's office and in the deputy warden's office. As part of that record, and in the early part of the execution of the sentence, the prison authorities determine and post on the card the maximum expiration date and the conditional release date for the particular inmate. In the case of the Petitioner, his maximum expiration date is June 14, 1971. His conditional release

date was fixed as June 14, 1970. That date is the date upon which he will be entitled to conditional release under the provisions of the Penal and Correction Laws of the State of New York if he duly applies for such conditional release.

The Petitioner in this case has duly and timely applied for conditional release.

Throughout a prisoner's incarceration, in the event of disciplinary action taken against him by the institution resulting in a loss of good time, that so-called loss of good time is added to the tentative conditional release date. In the first instance, the institutional procedure provides for a determination of judgment on disciplinary action which is tentative. Those tentative judgments are subsequently reviewed by a Prison Board who make a recommendation to the Commissioner with reference to the restoration of good time which has been tentatively taken away from the prisoner under disciplinary judgments.

The prison or institution Board, to determine the good time allowances to be made to the Petitioner, met on or about February 11, 1970 and made a report to the Commissioner of Correction, a copy of which is designated as Respondents' Exhibit F, and a copy of which was also attached to the petition herein.

During the Petitioner's incarceration on a number of occasions he was disciplined as a result of alleged infractions of prison rules. The disciplinary judgments material to this proceeding all occurred on or about January 7, 1969, or January 9, 1969, except for a judgment on or about September 1, 1968, which resulted in the loss of ten-days good time, and a judgment of March 24, 1969, which resulted in a loss of thirty days good time. The judgments resulting in the loss of good time on those two occasions is not seriously questioned. The ten-day loss of good time with reference to the offense on or about September 1, 1968 of making pass in the visiting room

*Appendix E.*

was admitted not to be an issue by the Petitioner in open Court. With reference to the offense of pasting a list on an already approved list of books, charged on March 24, 1969, and resulting in the loss of thirty days good time, I find that the charge was properly made, prosecuted and the loss of good time did not result from any violation of any constitutional rights of the Petitioner.

On or about January 7, 1969, the Petitioner was charged while an inmate at Green Haven Prison, the charge is contained in Respondents' Exhibit G and reads as follows—"It is a report to the Warden on a form used by the prison indicated to be GHP and headed 'Disciplinary Action'."

In substance, it charges Katzoff, the Petitioner, with writing a diary containing derogatory statements about the administration of this institution, and making statements in his diary about his sexual desires towards Miss Kelly and Mrs. Pendelton, who are employed here. "It would appear that this inmate would force his attentions on the above-named women if the opportunity would arise."

I find that that charge was made against the Petitioner, that he pleaded guilty to it and that the judgment was that he be confined in segregation, without a stated time limitation, that ninety days of good time was lost or taken away from him, and the diaries were confiscated. As a matter of credibility, the Petitioner from his appearance, general demeanor, background, interest, does not impress the Court. I find that there is no rule or regulation of any of the institutions of the State of New York that prevent the keeping of a diary. I find that this diary was commenced with the prisoner's first incarceration, which I believe was at Sing Sing; that portions of the diary were taken with him from Sing Sing to Dannemora, from Dannemora to Green Haven State Prison before they were confiscated.

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I find that the prison officials subject all entering inmates to a careful scrutiny in addition to their person, to the belongings with which they come. The officials at all of the institutions at which these diaries were maintained knew of the diaries prior to the time that they were confiscated and the time the Petitioner was charged with their maintenance as a violation. There is no evidence that the contents of the Petitioner's diaries was in any way publicized by him or published among the prison population. The recording in the diary on the basis of the proof in this case constituted nothing more than the recording of the thoughts of the Petitioner. The Prison Board, in considering the lost good time assessed for infractions, considered a total of 160 days plus 28 days not earned. The 28 days not earned result from the inability of a prisoner to earn good time under certain conditions, such as being sent to segregation or keep locked, I believe, as a disciplinary measure. Of the 28 days the Petitioner lost on that basis, only 20 days is in issue in this case. The time assessed for infractions of 160 days considered by the Prison Board and on which they made their recommendations to the Commissioner include 30 days loss of time defined on the back of Exhibit F, the report to the Commissioner "Had brother bring in tape recorder that would not be detected by metal detector at gate." I am satisfied that the prison authorities in setting up that charge were referring to the charge made on January 9, 1969 against the prisoner, evidenced by Respondents' Exhibit B. That Exhibit indicates that the charge was "a conspiracy to violate visiting rules," and I am reading, "in that this inmate did conspire (as shown by his own diary) with his brother, Paul, to have brought into the visiting room a recording device and that he did instruct Paul to check with an electronics firm in New York City as to the possibility of obtaining a recording device that could not be

detected by the metal detector at the front gate." The judgment on that charge as recorded on the disciplinary action report is "Brother Paul is removed from visiting and correspondence list."

I am satisfied that the error on the back of the report to the Commissioner in indicating 30 days lost time for that violation results from a misreading of the inmate's record card, also referred to as the warden's card, because the charge that I have just read occupies 2 lines on that card and the 30 days "L/T" is below those 2 lines and opposite an entry headed 1-9-69 VanVlack Writ about Dep. Comm. Cain in Imp. and derog. manner. Thirty days "L.T."

The entry as interpreted in this manner is supported by the disciplinary report, Respondents' Exhibit D, which relates to the charge that I have just read and commences writing about "Dep. Comm. Cain in an imp. derog. manner" and indicates a guilty plea with a judgment of guilty and thirty days lost time. Consequently, I am satisfied that the entry relating to the brother on the back of the report to the Commissioner is an error.

There is no evidence that the diary or that portion of it relating to the derogatory remarks about Deputy Commissioner Cain in which he was called a creep in the diary, was published to any of the prison population.

Mr. O'Brien: Would you mind making a finding with respect to the fact that employees, correction officers of the prison, did however read this information?

The Court: Yes, I so find, and I will give you an opportunity when I am through to supplement the findings.

The important thing with reference to calling the Deputy Commissioner a creep, however, is that there was no reference to that in the report to the Commissioner, that is, that is where the confusion between interpreting the inmate's record card and the individual disciplinary action first arose.

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Pursuant to the judgment relating to the charge of January 7 as indicated in Respondents' Exhibit G, the Petitioner was confined to segregation for approximately two months; that as a result of the two-months confinement in segregation, the Petitioner suffered a loss of twenty days good time.

I may be repeating myself, but at the risk of doing so, the Prison Board met on or about February 11, 1970 and restored 100 days out of 188 days of good time tentatively taken away from the prisoner. They stated as their reason: "Continuous disciplinary reports. See over." I find that in considering the numer of proceedings that are handled, that while the reason is terse, it is adequate to advise the Commissioner of the reason for not restoring all of the good time, or for restoring that part that was restored.

Now I think that covers the factual situation in the case. Do either counsel have any suggested amendments or additions to the proposed order or to the findings as I have just dictated them?

Mr. Michaels: No, your Honor.

Mr. O'Brien: I have no such requests to make.

The Court: All right. Now I am going to the Conclusions of Law.

The Court has jurisdiction of the action pursuant to 42 U. S. Code, Section 1982, 28 U. S. Code, Sections 1343(3), 1651 and 2241, etc.

The petition is being construed with the liberality to which a *pro se* petitioner in prison is entitled. I regard it as a petition alleging a violation of his civil rights and asking for a writ of *habeas corpus* as incidental to the enforcement of any judgment to which he might be entitled if the issuance is necessary.

Due process, of course, is related to the circumstances concerning which it is applied. In the case of prisoners,

recognizing the necessity of the authorities to maintain discipline, recognizing their expertise and recognizing the desirability of avoiding interference with their administration of the prison system, the degree of due process to be applied is of a minimal nature. I feel that the procedural due process under the circumstances, on the basis of the evidence I have heard was not established by the Petitioner to be insufficient.

However, regardless of the amount of due process, procedural due process to which he is entitled, a minimum would require that he not be punished for acts which are not a violation of any prison rule or regulation. I am satisfied that the rules and regulations that govern the management of our penal institutions have been drawn by experts and have been drawn in sufficient detail to cover in some manner any act which would be disruptive of the good discipline, management and purposes of the institution, and when the respondents fail to point to any regulation which is violated, then the person has not been afforded due process under that charge.

In addition, the writing in a diary, unpublished, to my mind is little different than thinking thoughts, I can't conceive of the thinking of any thoughts being the basis of disciplinary action on the part of the prison officials. Assuming that there were regulations that prohibited the keeping of diaries—and I find there are none—segregation for that offense, unpublished, for 60 days would constitute under the decided cases cruel and unusual punishment. As a result, the twenty days that was lost by the Petitioner resulting from the segregation, that was taken from him in violation of his rights to due process and equal protection of the law under the Fourteenth Amendment, to punish him at all for thinking would violate his First Amendment rights.

I conclude that the charge set forth in Exhibit G resulting in 90 days lost time deprives the Petitioner of his

constitutional right to equal protection of the law and due process.

I conclude that the charge concerning writing derogatory matter, in an improper and derogatory manner about Commissioner Cain, and for which 30 days lost time was taken, violates the Petitioner's constitutional rights to due process and equal protection of the law.

I conclude that the Petitioner is entitled to a judgment directing the respondent Commissioner to restore the 90 days lost time—

Mr. O'Brien: It has already been restored, Judge.

The Court: I am aware of that, to restore the 90 days—

Mr. O'Brien: May I ask the purpose of the direction.

The Court: I think it will become clear if you permit me to finish.

Mr. O'Brien: I am sorry.

(The Reporter read back the last paragraph as above recorded.)

The Court: —resulting from the charge set forth in Respondents' Exhibit G and to restore the 20 days lost time which resulted from the two months in segregation imposed as punishment for the charge set forth in Respondents' Exhibit G and for the 30 days lost time imposed as a result of the charge contained in Respondents' Exhibit D.

The determination of the Commissioner that the respondent was entitled to the restoration of 100 days good time—

Mr. O'Brien: The Court please, it is not a determination of the Commissioner, it is a determination of the Prison Communtation Board.

The Court: Well, my understanding is that they merely recommend to the Commissioner.

Mr. O'Brien: No, they do not, the Prison Communtation Board makes the determination and merely sends in a re-

part giving reasons to the Commissioner for such determination. It is not a recommendation.

The Court: Then I will phrase the judgment—the respondents or the officers or agents acting under their authority should be directed to correct the records to reflect the corrections in the loss of good time made in these conclusions. In doing so, it is understood that the respondents have already granted to the Petitioner the 90 days relating to the charges contained in Respondents' Exhibit G—is that your position?

Mr. O'Brien: Well, I don't go along with the Court's—what do you mean?

The Court: I mean it is your position that he shouldn't be credited with the 90 days twice?

Mr. O'Brien: My position is the Court is ruling on something here which doesn't require a ruling.

The Court: I don't want to give him credit for time that he didn't lose twice. Now, is it your position that he has already, by action of the Prison Board, received credit for the 90 days lost time?

Mr. O'Brien: Yes, your Honor, in fact in his petition he asked for a maximum of 40 days, and the Court here is ruling on 90 days, and the proof is undisputed that this 90 days that a disciplinary officer imposed, was wiped out by a Prison Commutation Board.

The Court: All right, if that is the position of the State, of the respondent, then I don't want to confuse the records or give them credit for it more than once.

Mr. Michaels: Your Honor, just so—I conferred with Mr. Katzoff, I believe we could stipulate to that.

The Court: All right, stipulate to what?

Mr. Michaels: That we are talking about the same time that has already been restored to him.

The Court: All right, if it has been restored it has been restored and that is so stipulated?

Mr. Michaels: Yes.

The Court: All right. So that it is stipulated then that the only good time in issue here is the 20 days of lost good time resulting from the confinement in segregation and the 30 days imposed—well, it wasn't 30 days imposed on the conspiracy—the 30 days imposed in relation to Deputy Commissioner Cain.

Mr. Michaels: That is the position of the relator, your Honor.

The Court: Is that correct? If there is any question about it, read the statement back. (The Reporter read back the above statement as recorded.)

Mr. O'Brien: I believe that's right your Honor, 30 days that was imposed upon him for writing these derogatory remarks about Commissioner Cain, that was a punishment wherein 30 days lost time that he had conceivably already earned was taken away from him.

The Court: All right.

Mr. O'Brien: And since the 90 days, the other punishment so far as good time is concerned that was taken away from him, was 90 days for this other activity, combination, I believe, that having been restored, the only other point in issue would be the 20 days that he lost as the result of being in segregation for 60 days and not being able to earn 1 day of good time for every 3 days.

The Court: So what is in issue then is the 20 days, the 90 days and the 30 days, that would be a total of 140 days, and the State's contention is that they have already credited 100 days against that?

Mr. O'Brien: And that has been stipulated to, I believe.

The Court: That has been stipulated, is that correct?

Mr. Michaels: We stipulate to the 90 days—I believe 110 came in as something else, I think the 10 days was picked up from something else.

The Court: That is the 90 and 20, it is 110.

Mr. Michaels: I don't have the Exhibit in front of me. I recall 90 and 10 having been restored, I don't remember where that 10 days was restored from.

Mr. O'Brien: That was the one making the pass, on which there is no dispute, so he got the benefit of that without asking for it.

Mr. Michaels: I agree with your Honor. I don't agree on the exact arithmetic.

The Court: I don't want any equivocation, I want to know what is stipulated so I can draw conclusions. As I understand it now, it is stipulated that the lost time in question is the 20 days of lost time resulting from the segregation, the 90 days of lost time resulting from the charges of Exhibit G and the 30 days of lost time resulting from the charges in Exhibit D, which make a total of 140 days. That 100 days have been credited, leaving 40 days at issue, is that correct?

Mr. Michaels: Yes, we agree with that.

The Court: Is that the stipulation now?

Mr. O'Brien: Well—

The Court: I am not trying to make the stipulation, I am trying to find out what it is.

Mr. O'Brien: Actually, Judge, I am afraid you get a little far afield here, because as far as the restoration, if the Court is relying on this Exhibit here, the 90 days that was restored to him on the back here includes within it the charge of writing a diary containing derogatory remarks about officers and administration officials, and not 30 days as is indicated on this specific single charge.

The Court: No, that charge has 90 days, it fits in with the item. What I am trying to do is sort these items out. The 90-day charge is a 1-7-69 charge. The disciplinary action of 1-7-69 describes that same thing, writing a diary containing derogatory statements about the administration of this institution, and so forth, and it is 90 days. Now that fits the Exhibit G and it fits the warden's card. That 90 days is no problem.

Mr. O'Brien: Of course the State's position here is that these mere notations on the back of this Exhibit here do not have the force and effect of these disciplinary reports.

The Court: That is exactly—

Mr. O'Brien: It is merely a notation made by some clerk to total up the time.

The Court: That is exactly the finding I make. I find that this is an error because it doesn't correspond with specific charges.

Mr. O'Brien: But our position is that even if it is a clerical error it isn't such an error that the Court should consider in arriving at its determination with respect to whether or not this individual has been afforded his rights under the Constitution.

The Court: I am not, except that by putting something on the back of this slip—for instance, the brother, the charge relating to the brother is recorded on the back of this Exhibit as 30 days. Now, I find as a fact that there was no such penalty imposed in relation to the brother. In relation to the brother it says: "Judgment. Brother Paul is removed from visiting and correspondence list."

Mr. O'Brien: What the Court is doing is delving into the record-keeping practices of the New York State Department of Correction and is being very critical and is basing his determination on a typographical or record-keeping practice.

The Court: No, my determination is not based on that.

Mr. O'Brien: Not upon the question of rights.

The Court: Just the contrary.

Mr. O'Brien: It would seem the other way to me.

The Court: Just the contrary. My determination is based on the facts, not the errors, and I am not being critical. If it appears that way, I want to correct the record, because in a prison institution that has the number of proceedings that they have over here in Auburn, if they

made any fewer mistakes it would be a source of wonderment, not if they made more.

Mr. O'Brien: As a matter of fact, during the course of the hearing I think your Honor also discovered that 10 days credit was given to this individual erroneously.

The Court: That's right, and I am not taking that—

Mr. O'Brien: Perhaps the Court should correct that error.

The Court: I will.

Mr. O'Brien: And impose—

The Court: I intend to.

Mr. O'Brien: All right.

The Court: I don't intend to perpetuate errors, that is just what I am trying not to do. Now what I want to know is, to get back to my original question, is that the stipulation, that what is involved here is the 90 days penalty that goes along with Exhibit G. If you refer to the exhibits, I think it will make it easier. In other words, it is the diary charges that I am finding don't constitute a charge.

Mr. O'Brien: But it is this same charge or the punishment therefor that was forgiven *in toto*, that is why I think the Court need not make a determination.

The Court: I am going to make a determination.

Mr. O'Brien: This I don't understand.

The Court: Well, I am not concerned about that. What I am concerned about is whether or not we have got a stipulation here of any kind so that I know what we are stipulating.

Mr. O'Brien: I would be willing to stipulate that insofar as this petitioner is concerned, the only thing that he stands deprived of in respect to time that he was entitled to earn would be a period of 30 days and a period of 20 days. That is all I can see, and I would be willing to stipulate to those items. I won't stipulate that he should get them back.

The Court: No. Well, you are saying exactly what I have been saying right along, 30 and 20 is 50, not 40.

Mr. O'Brien: But you are asking me for a stipulation. I will stipulate to that, too.

The Court: All right. I will add to my findings of fact, in view of counsel's statement, counsel for the respondent, that the Prison Board restored 90 days of good time which was taken away as the result of charges contained in Exhibit G, and in addition, 10 days of good time which was taken away as a result of a charge on or about September 1, 1968 of making a pass in the visiting room, of 10 days; is that the State's contention?

Mr. O'Brien: That's correct, your Honor.

The Court: All right. Then that clears the situation up. Now I will have to—I hate to bore you with a rereading of this, but in order to put it in some kind of sequence I don't know what kind of a judgment I have ordered. Now, will you read that back from where I started to make my conclusions of Law?

(The Reporter read back as directed.)

The Court: All right, now change that and take that out. The colloquy should remain.

On the basis of the stipulation of respondent's counsel that the 90-days good time which was taken away from the prisoner by reason of the charges contained in Exhibit G was restored by action of the Prison Board, it will not be necessary to again restore that good time, although the judgment violated the petitioner's rights, constitutional rights. He is entitled to a judgment directing the restoration of the 30-days lost time resulting from the charges contained in Respondents' Exhibit D for the same reasons that relate to the charges contained in Respondents' Exhibit G. He is also entitled to a judgment restoring the 20-days lost time resulting from his being in segregation for a period of 60 days pursuant to the charges contained in Respondents' Exhibit G. Accordingly, he is

entitled to a judgment requiring the appropriate officials to recompute his lost or his good time and conditional release date, by giving him credit for the 20 days and the 30 days hereinabove referred to.

In determining that release date, the authorities and respondents are not to be bound by an apparent error that was made in calculating his release date as September 2, after giving him 100 days restoration of good time.

The findings of fact should include a finding that the Prison Board determined that the revised release date was September 2, 1970. This was an obvious error in computation. The revised date, according to the testimony should have been September 12.

In order to be more than fair with the prisoner, the prison authorities retained the release date as September 2, 1970, knowing that was an error, by reducing the days of lost time resulting from confinement in segregation from 28 to 18. It is not the intention of the Court to perpetuate any errors, but to have the authorities compute a correct release date based on the credits to which the Court has found the prisoner entitled. According to the Court's computation, by restoring 20-days good time referred to and the 10-days good time referred to, the prisoner would be entitled to conditional release at once, is that correct, Mr. O'Brien? I think it is quite obvious.

Mr. O'Brien: I believe that is correct, your Honor, and even assuming that the 10 days was placed back on.

The Court: I am assuming that.

Mr. O'Brien: Yes, the conditional release date would be the first week in August.

The Court: Some time early in August, yes.

Now let me ask you, it is apparent from what I have said that a judgment should be entered directing his release, that is, on conditional release subject to the provisions of the conditional release forthwith. Now I am appreciative of the fact that you just can't—I assume there is some kind

of processing that has to be done. Now, can that be completed by tomorrow?

(Discussion held off the record.)

The Court: All right then, I will find, I will adjudge that he is entitled to a judgment under which he is entitled to his release forthwith, the judgment to be stayed for not more than 2 days to give the prison officials the opportunity to go through the necessary processing.

I will prepare an order right now and have it served on you. That is what I propose doing. I wouldn't want you to act otherwise.

Now, are there any suggestions in relations to the findings or conclusion?

Mr. O'Brien: I would like to take an exception.

The Court: You are giving an exception to everything I have said from the minute I opened my mouth. You have got an exception to everything I said.

I am wondering if there ought to be any corrections to anything I have said or anything that I have omitted.

Mr. O'Brien: I don't wish to prolong—I don't know whether I will get a hotel room—but I was wondering if your Honor overlooked one of these charges here with respect to conspiracy to smuggle in the tape recorder, and if your Honor would make a finding on that and say that—

The Court: I think I did.

Mr. O'Brien: I don't recall that. Did you find that that was cruel and unusual punishment?

The Court: No, I found that the charge was placed and that the judgment was that brother, Paul, is removed from the visiting and correspondence list in accordance with Respondents' Exhibit B. That was the judgment. On the back of the slip when they referred to it—that is what I was trying to get at, on the back of the report when they referred to 30 days for that violation, it was clearly an error. It doesn't jive with any of the records, but it is an understandable error because the record card is so crowded.

Mr. O'Brien: Well, I know, but with respect to your findings of fact, your Honor has found that writing scurrilous things about a Deputy Commissioner is not a violation of any rule, and may be committed, this act may be committed freely by any inmate of a State prison without the imposition of any penalty therefor, if I understand your finding.

The Court: With reference to the conspiracy to violate the visiting rules, the whole matter is moot because the only punishment imposed—

Mr. O'Brien: I am talking about the writing of scurrilous—you made a specific finding of fact that writing scurrilous remarks in the diary is the same as thinking them.

The Court: That's right.

Mr. O'Brien: And even conceding that prison employees who may see this, and whose morale may be affected by it, for instance, a correction officer may come across a diary which he might have to look into for security purposes, which was done here—

The Court: I don't think I have any such evidence. The only evidence I have got is that they did look at it.

Mr. O'Brien: I don't wish to try the case over, but—

The Court: I made the finding—now a minute ago you were talking about the recording device, that is disposed of because it was moot.

Mr. O'Brien: The bringing of the diary is moot, that was my point.

The Court: No, it isn't, because that related as well to Commissioner Cain. There was an addition of 30 days.

Mr. O'Brien: I would like to request the Court for a two-day stay to enable the respondents to apply to the Second Circuit for a stay.

The Court: I will stay it for 2 days that I have stayed it in order to permit the prison authorities—that is, today is Tuesday, it is stayed until Thursday noon to permit the prison authorities the opportunity to process the prisoner and get him on parole.

Mr. O'Brien: Would your Honor be willing to give us until Thursday noon to make application to the Second Circuit for a stay?

The Court: I don't think you need my permission, but I can't see any need for a stay. The man is going on parole, you can always pull him back.

Mr. O'Brien: Judge Motley stayed her decision.

The Court: I don't think Sostre was ready to get out. I don't think he will be ready to get out for a long time.

Mr. O'Brien: In any event we may apply to the Second Circuit?

The Court: Certainly. If a judge of the Court of Appeals feels this order should be stayed, there is nothing to prevent you from getting a stay. As a matter of fact, I am not as sensitive as the prison authorities, you can do it and call me a few names at the same time.

Mr. O'Brien: We wouldn't do that, but I am wondering if we would have an order to go to the Second Circuit with by Thursday noon.

The Court: I don't know about that. He is on parole. Suppose it was September 2, you would let him out and he would be on parole, and if he violated it you would get him back. If the judgment is to be stayed, I think you have time enough to get it. In any event, I will treat this as an application for a stay and it is denied beyond the time granted.

Now, gentlemen, if I can impose on you for just a few minutes I will go in Chambers and dictate a judgment so that—this will be a very short judgment.

Mr. O'Brien: Like a writ of habeas corpus, I suppose.

The Court: It will be a direction and a judgment and direction so that the officials, so that the warden will have something to act on.

(Discussion held off the record.)

*Appendix E.*

The Court: Here's what you can do on the exhibits. Let it appear that the attorney for the respondent and prison officials have asked for the original records. I have xeroxed copies which are a little better than the wet copies that you have. I will substitute those for the originals with the understanding that if the originals are needed in the Court of Appeals that they will be supplied, of course. (Thereupon, a short recess was taken after which the hearing was resumed.)

The Court: Let the record show that I am handing to the Clerk for filing an original judgment signed by the Court in this matter, together with a signed copy for filing with the Clerk's office.

The Clerk is directed to file the same. I also have copies for counsel. I want a copy for Mr. Grattan, I want a copy for the Petitioner, 3 additional copies, and I ask you to certify them and then deliver them to the parties now. That should take care of your requirements, Mr. Grattan.

I will direct the Clerk to serve a certified duplicate original copy of the decree on Mr. Grattan, certified copy on counsel for the respondents and a certified copy on the counsel for the Petitioner for the Petitioner's use.

Let the record show that the service was done in accordance with the Court's direction, and we stand adjourned to Chambers.

This is to certify that the foregoing record is a true and accurate transcript of the proceedings had at the time and place noted in the heading hereof.

MARTIN L. MILLER
Official Reporter
United States District Court
Northern District of New York

## Appendix F.

John Kritsky, and United States of America ex rel. John Kritsky, Plaintiff-Petitioner,

v.

Paul D. McGinnis, Commissioner of Correction; Russell G. Oswald, Chairman of the Board of Parole, J. Edwin LaVallee, Warden and Chairman of the Prison Board of Clinton State Prison, New York State Board of Parole and New York State Department of Correction, Defendants-Respondents.

No. 69-CV-276.

United States District Court,
N. D. New York.

June 12, 1970.

James T. Foley, Chief Judge.

Memorandum—Decision and Order

The plaintiff filed a handwritten complaint based upon the civil rights statutes and petition for habeas corpus in the same combined form with similar issues as filed in Rodrigues v. McGinnis (N.D.N.Y.—December, 1969) 307 F. Supp. 627, that after trial I ruled upon in favor of Rodrigues. He paid the $15.00 filing fee and thereafter I granted leave to prosecute his action in forma pauperis. Attorney Richard A. Kohn, who appeared for Rodrigues, agreed to act as counsel for plaintiff, for which assistance the Court is again grateful inasmuch as there is no provision for compensation of any kind or reimbursement for expenses. Attorney Kohn represented the plaintiff at the hearing held and submitted a substantial brief in his behalf on the law and facts after the transcript was available. Transcription of the minutes of the hearing understand-

ably took some time and caused delay in the briefing. Two court reporters in this busy two Judge Court, where we have the flow also of other purely federal and important private and government civil and criminal cases as other District Courts do, place substantial burdens upon them in the coverage of our large geographical area to the same extent as it does upon the Judges deluged with state prisoner applications of every kind. Pressures of other work that I thought should be given priority prevented on my part the speedy disposition we try to give State prisoner applications where immediate liberty may be at stake. However, the filing in this Court of a substantial number of civil rights complaints for every grievance imaginable by New York State prisoners in recent years has slowed considerably the disposition within the desired reasonable time. However, in my judgment, the other numerous and substantial cases filed in this District Court in behalf of important private and governmental interests have the right to be processed, heard and decided also with reasonable dispatch. I reaffirm my statements in Rodriguez that it is my firm belief it would best serve the interest of justice and all concerned and be sensible if a little abstention were authorized when proper in the federal courts to allow a fully manned and recognized competent State Court system to hear these civil rights claims that primarily involve State interests, problems and concerns (See Wright v. McMann, 387 F.2d 519, at 528, Chief Judge Lumbard concurring).

A satisfactory hearing in this claim was held and reference herein shall be to the transcript of it. In the complaint, the plaintiff requests a judgment declaring the disallowance of 939 days good behavior time toward the conditional release he elected formally for under certain New York statutory provisions was adjudged in such manner as to violative of constitutional rights of due process and imposing cruel and unusual punishment. (Pl.Ex. 1, §§

230-a, 803(1), N.Y. Correction law (McKinney's Consol. Laws, c. 43, 1968 ed.); New York Penal Law, 70.30(4) (a); 70.40(1), (b), (McKinney's Consol.Laws, c. 40, 1967 ed.).

The position of the Assistant Attorney General in behalf of the defendants is the same as that taken and offered in Rodriguez, supra. The contentions (1) there is not jurisdiction under 28 U.S.C. § 1343(3), as so invoked to entertain the civil rights claim authorized by 42 U.S.C. § 1983, (2) that conditional release is in the same category as parole, being a matter of grace to be withheld at will, are answered in my Rodriguez writing in relation thereto and are adhered to by reference herein. (See also the difference between parole and conditional release—Task Force Report on Correction, issued by the President's Commission on Law Enforcement and Administration of Justice, p. 86). In Rodriguez, I pointed out that New York rulings expressly held that discretionary reductions for good behavior time cannot be arbitrarily withheld. (People ex rel. Stark v. Deegan (1968) 56 Misc.2d 567, 289 N.Y.S.2d 285; People ex rel. Roy v. Murphy (1962) 36 Misc.2d 501, pp. 503-504, 233 N.Y.S.2d 382). Inasmuch as New York seems adamant in arguing need for exhaustion of state remedies and lack of jurisdiction in a problem of this kind concerning loss of good time allegedly disallowed unconstitutionally, appeal is invited again to be expedited that may settle once and for all these questions that by now must be ripe for federal appellate review and rulings. Such appellate guidance will be of great assistance to this District Court in the planning and management of its calendars. (See Sostre v. Rockefeller et al., 312 F.Supp. 863, (S.D.N.Y.—68 Civ. 4058—Motley, J.) decided May 14, 1970).

The challenge of the petitioner who was produced in Albany on a writ of habeas corpus from Clinton Prison, two hundred miles away, was reduced before the hearing

after conference with his attorney from 939 days disallowed to 590 days. This good time disallowance was then narrowed to a single episode, unquestionably a serious one, that occurred in Auburn State Prison during March 1962. Two witnesses testified at the hearing, the plaintiff, who in my judgment was as articulate a witness who could be heard and who gave his version of the serious incident in which he was admittedly involved, and that led to the judgment of the Principal Keeper set forth in Plaintiff Ex. A in this brief fashion: "To Segreg.—1½ years Lost Time". The lost time, or good behavior time credits taken for a year and one-half are computed to be 545 days, and the length of his segregation from March 14 to April 10, 1962 at Auburn and April 10 to July 28, 1962 at Clinton Prison, Dannemora, is the basis for the additional 45 days good time loss in issue. No good time by prison rule is earned while confined in segregation. (Def. Ex. B—Inmate's Rule Book, pp. 4-5). The only other witness, who testified was Francis Ryan, called by the plaintiff, Head Correctional Clerk at Clinton Prison who explained the law and rules and procedures applicable and the internal administrative methods followed by the so-called Prison Commutation Board to comply with the statutory review provision when good time forfeiture is reviewed and not restored (Tr. 75 et seq., §§ 234, 235, 236, N.Y.Corr. Law; 7 N.Y. C.R.R. (Correction—Codes, Rules & Regulation, §§ 1(e). Ryan with a long experience in Prison administration evidenced familiarity with all the procedures and at times as he testified sat when necessary as a member of the Commutation Board and was able to tell the full details of the way it actually operates and arrives at decisions. (See particularly Tr. 96-105.)

The Plaintiff Kritsky was convicted in the former Court of General Sessions of New York County of Robbery First Degree on May 1, 1957. He was sentenced to an indeter-

minate term of 15-18 years. At the time of sentence, he was about 22 years of age and has been now more than 13 years in prison confinement.

The serious incident referred to previously was described by Kritsky in his testimony that stands in every respect uncontradicted in this record by other testimony concerning the circumstances of its happening. It seems that in 1962 the prisoners at Auburn in a protest move that Kritsky said occurred throughout the entire State prison system in an effort to persuade the New York legislature to grant by legislation ten days off the maximum sentence that would enable some prisoners to gain earlier release. (Tr. 28-29). Apparently, this protest later bore fruit and such legislation came into being (See also People ex rel. Clemente v. Warden (1961) 9 N.Y.2d 216, 213 N.Y.S.2d 55, 173 N.E.2d 784). Kritsky characterized the conduct of the prisoners as peaceful and said it consisted only of the prisoners entering and staying in their cells and refusing to come out to go to their work or other type assignments in the daily prison routine. The protest by their action lasted about one and a half days. The prisoners were warned that if they did not come out of their cells by a certain time they would lose one year good time and Kritsky said about ⅞ at Auburn did come out after this warning (Tr. 30). Kritsky came out about an hour later than the deadline, and the next morning went to his work as a clerk in a prison office. However, he testified he noticed many of his friends no longer there, so he went back that afternoon to his cell again contrary to what he was supposed to do. He was taken from the cell five to fifteen minutes later, and was taken to segregation where he was kept for a week to ten days before he came before the Principal Keeper for hearing. Again, I do not intend to minimize the seriousness of this entire affair, no matter how laudable the purposes, because it is evident prison discipline and order

uld be in great peril if protest movements, so common-place and at times upsetting to some in these days, were to be given free rein in prison systems where firmness and application of quick and adequate discipline is clearly an essential to safeguard the security of a large prison and circumvent the start or spread of possible riot and rebellion. No court would want to interfere with these delicate judgments.

However, as grave an intrusion as I think all these are, particularly when made by a federal court into administration of State prisons that do not really entail the cruelty or inhumaneness that shocks everyone, I find that the due process of rights of the plaintiff were violated in the type hearing given plaintiff in 1962. The hearing was held a week or ten days after the protest in a room off the segregation area where plaintiff had been confined with only the Principal Keeper, as the disciplinary authority and judge. The plaintiff's testimony is graphic description:

"A. He (Principal Keeper) advised me that I had been charged with advocating insurrection and a revolution and advocating incendiarism in the prison. He said, 'How do you plead?' I said, 'Not guilty.' He said, 'Eighteen months lost time.'

I attempted to speak—

The Court: Wait a minute. He said, 'How do you plead?'

The Witness: I said, 'Not guilty.'

The Court: All right.

The Witness: I attempted to speak and he interrupted and said, 'That will be all.' And I replied, 'In other words, I am being summarily dismissed.' He said, 'Yes'."

In my judgment, this hearing, and I accept it as truthfully described by the plaintiff, falls far short of the fundamen-

tal fairness expected of due process requirements, no matter the need for summary disposition.

Defendant's Exhibit A, measuring by ruler about 5¼" by 8", is entitled "Disciplinary Action". It contains in most abbreviated form the charges against plaintiff, the substantial judgment rendered against him, and remarks of the disciplinary hearing officer, the Principal Keeper. The remarks without a single reference or elaboration of any kind to person or record concludes "Advocated bloodshed and burning place." There is only a dash in a large space before the word guilty which is difficult to accept as a valid admission of guilt by reason of record regularity in view of the flat contradiction by the plaintiff.

[1-4] Due process is an elusive concept but there is settled satisfactory guides to discern its absence or presence. What is due process depends on the circumstances and it varies with the subject matter and necessities of the situation. (Moyer v. Peabody (Holmes, J.) 212 U.S. 78, 84, 29 S.Ct. 235, 53 L.Ed. 410). A hearing to accord with due process must be given at a meaningful time and in a meaningful manner. (Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62). Under the concepts of the present day, it has been stated the decision maker should state reasons for the determination, indicate the evidence relied upon, and an impartial decision maker is essential. (Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287, 3/23/70). The right to be heard before being condemned to suffer grievous loss of any kind is a principle basic to our society. (Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 95 L.Ed. 817). Applying these principles, I am constrained to rule there was a lack of due process that resulted in grievous loss to plaintiff by reason of continued confinement.

By this ruling, I do agree that in these prison disciplinary procedures there is no need for a full panoply of judicial

due process which was the language and recommendation contained in the Task Force Report on Corrections, issued by the President's Commission on Law Enforcement and Administration of Justice, at p. 13. I would think sufficient and fair the four requisites outlined by Judge Wyzanski in Nolan v. Scafati (D.C.Mass.) 306 F.Supp. 1, 3, for proper procedure before prisoner such as plaintiff is subjected to a serious penalty. (See also Landman v. Peyton (4 Cir. 1966) 370 F.2d 135). The ruling herein is also not to be construed as one to the effect that unrestricted and absolute right to free speech should be accorded prison inmates. (See Whitney v. California (1927) 274 U.S. 357, 373, 47 S.Ct. 641, 71 L.Ed. 1095; Roberts v. Pepersack (D.C. Maryland 1966) 256 F.Supp. 415, 428). Prison discipline is essential and certain rights have to be curtailed in order to achieve it. (United States ex rel. Wakeley v. Pennsylvania (D.C.E.D.Pa. 1965) 247 F.Supp. 7).

I also find as in Rodriguez a failure to comply with the statute of New York that directs the prison commutation board to forward its reasons in writing to the Commissioner of Correction for disallowance of good behavior time (N.Y.Correction Law, Section 236). There was a letter from the Warden, to the Commissioner, Def.Ex. C, derogatory to the conduct of plaintiff but it was conceded that this letter was not being offered as strict compliance with Section 236, but was sent for another purpose. (Tr. 102). In my judgment, the record in this case shows the importance this report of reasons might have in relation to the review by Commissioner of the disallowance by the Commutation Board. There is a progress report made by Correction Officer Burke that evaluates the conduct of the plaintiff and his willingness to work attitude in the most praiseworthy terms. (Tr. 107, 108.) Some of the terms are that plaintiff is courteous, cooperative, well behaved with good attitude toward society and authority, who does not need close supervision and was a very exceptional worker. The

appraisal directly contradicts the one contained in the letter of the Warden. Unfortunately, it is established that the Prison Commutation Board ordinarily would not have this progress report of a guard who was in the closest of contact with plaintiff.

My findings of fact are set forth above. My conclusion is that the plaintiff in the imposition of the lost time punishment and segregation was not accorded due process. My judgment declared hereby is that the disallowance of 590 days good behavior time resulting therefrom is void and unlawful as violative of the provisions of the Fourteenth Amendment of the United States Constitution. The Commissioner of Correction, a named defendant, is directed hereby to restore the good behavior time credit to plaintiff; such restoration will entitle plaintiff to release forthwith to parole supervision under his Conditional release election. If plaintiff is not released forthwith, the attorney for plaintiff shall submit a writ of habeas corpus to effect the release. All exhibits shall be filed with this decision in the Clerk's office at Utica.

Judgment shall enter granting the relief to the plaintiff particularly set forth in the above paragraph. This decision constitutes the judgment.

It is so ordered.